377.

SUPREME COURT OF THE UNITED STATES.

No. 34.

COMMONWEALTH BANK OF KENTUCKY, PLAINTIFF IN ERROR,

vs.

THOMAS GRIFFITH ET AL.

IN ERROR TO THE SUPREME COURT OF THE FIRST JUDICIAL DISTRICT OF MAINE.

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Langtree & O'Sullivan, Print.

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UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honourable the Judges of the Supreme Court of the State of Missouri, holden at the town of Fayette, in the county of Howard, in and for the first Judicial District of said State, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of Missouri, in and for the first judicial district, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas Griffith, Thomas W. Collier, and Elisha McClelland, plaintiffs, and the president and directors of the Bank of the Commonwealth of Kentucky, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favour of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said president, directors, and company of the Bank of the Commonwealth of Kentucky, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honourable Roger B. Taney, Chief Justice of the said Supreme Court, this second Monday of January, in the year of our Lord one thousand eight hundred and thirty-nine.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by

JOHN McLEAN,
Justice Supreme Court U. States.

2d March, 1839.

Know all men by these presents, that I, John J. Crittenden, am held and firmly bound unto Thomas Griffith, Thomas W. Collier, and Elisha McClelland, in the full and just sum of five hundred dollars, to be paid to the said Thomas Griffith, Thomas W. Collier, and Elisha McClelland, their certain attorney, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this second day of March, in the year of our Lord one thousand eight hundred and thirty-nine.

Whereas lately at a Supreme Court of the state of Missouri, holden at the town of Fayette, in the county of Howard, in and for the first judicial district of said State, in a suit depending in said court, between Thomas Griffith, Thomas W. Collier, and Elisha McClelland, plaintiffs in error, and the President, Directors, and Company of the Bank of the Commonwealth of Kentucky, a judgment was rendered against the said President, Directors, and Company of the Bank of the Commonwealth of Kentucky; and the said President, Directors, and Company of the Bank of the Commonwealth of Kentucky having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas Griffith, Thomas W. Collier, and Elisha McClelland, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of January next.

Now the condition of the above obligation is such, that if the said President, Directors, and Company of the Bank of the Commonwealth of Kentucky shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

J. J. CRITTENDEN, [SEAL.]

Sealed and delivered in presence of

WM. THOS. CARROLL.

Approved by

JOHN McLEAN,
Justice Supreme Court U. States.

THE STATE OF MISSOURI, } *sct.* *Supreme Court.*
First Judicial District, }

Proceedings had before the Hon. the Supreme Court within and for the first judicial district of the State of Missouri, to wit:

Preamble.

Be it remembered, that heretofore, to wit, on the fourth day of May, in the year of our Lord eighteen hundred and thirty-five, a transcript from the clerk of the circuit court of the county of Callo-

way, in the case of "The President and Directors of the Bank of the Commonwealth of Kentucky against Thomas Griffith, Thomas W Collier, and Elisha McClelland," was, in pursuance of a writ of error previously directed to the hon. the judge of said court, filed in the office of the clerk of the Supreme Court aforesaid, which said transcript reads in the words and figures following, to wit:

"STATE OF MISSOURI, *County of Calloway, sct.*

Pleas before the Honorable David Todd, judge of the first judicial circuit of the State of Missouri, and judge of the Calloway circuit court in said State.

At a circuit court continued and held for the said county of Calloway, at the court house in the town of Fulton, the place appointed for the holding of said court in and for said county, on Friday, the 10th day of October, A. D. 1834.

Be it remembered, that heretofore, to wit, on the sixth day of May, in the year of our Lord one thousand eight hundred and thirty-four, The President and Directors of the Bank of the Commonwealth of Kentucky, by their attornies, Russell & Leonard, filed in the clerk's office of the said circuit court of the county aforesaid, their petition against Thomas Griffith, Thomas W. Collier and Elisha McClelland, which is in the words and figures following, to wit:

THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KY.
vs.
THOMAS GRIFFITH and others.

CALLOWAY CIRCUIT, *sct.*

Petition.

The President and Directors of the Bank of the Commonwealth of Kentucky, plaintiffs, state that they hold a note on the defendants, Thomas Griffith, Thomas W. Collier, and Elisha McClelland, in substance as followeth:

"$550. NICH'S COUNTY, Feb'y 15, 1827.

One hundred and twenty days after date, we, jointly and severally, promise to pay the President and Directors of the Bank of the Commonwealth of Kentucky, or order, five hundred and fifty dollars, negotiable and payable at the branch bank at Flemingsburg, for value received. Witness our hands:

THOMAS GRIFFITH,
THOS. W. COLLIER,
ELISHA McCLELLAND."

Yet the said debt remains unpaid; wherefore, they pray judgment for their debt, and damages for the detention of the same, together with costs.

RUSSELL & LEONARD,
Attornies for Plaintiffs.

Upon the foregoing petition, the following endorsement is made, to wit:

Endorsement upon Petition.

CALLOWAY CIRCUIT COURT.—No. 1.

"THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY
vs.
THOMAS GRIFFITH, THOMAS W. COLLIER, ELISHA MCCLELLAND.
} Petition in Debt.

This is a petition in debt, together with the note sued on. The clerk will file them, and issue a summons to Montgomery, for Thomas Griffith, to St. Charles, for Elisha McClelland, and to Calloway, for Thomas W. Collier.

RUSSELL & LEONARD, *for plaintiff.*"

The note sued on, and which was attached to and filed with the foregoing petition, is in the words and figures following, to wit:

Note sued on.

"$550. NICH'S COUNTY, Feb'y 15, 1827.

"One hundred and twenty days after date, we, jointly and severally, promise to pay the President and Directors of the Bank of the Commonwealth of Kentucky, or order, five hundred and fifty dollars, negotiable and payable at their branch bank at Flemingsburg, for value received. Witness our hands.

THOS. GRIFFITH,
THOS. W. COLLIER,
ELISHA McCLELLAND."

Upon the back of a true and attested copy of the foregoing petition, a summons issued on the said 6th day of May, A. D. 1834, against the defendant, Thos. W. Collier, directed to the sheriff of Calloway county, which is in the words and figures following, to wit:

Summons to Calloway vs. Thos. W. Collier.

"STATE OF MISSOURI, *County of Calloway*, } ss.
First Judicial Circuit of said State. }

The State of Missouri to the sheriff of Calloway county, greeting:

You are hereby commanded to summon Thomas W. Collier, that he be and appear before the judge of our circuit court for the circuit and county aforesaid, at the court house in the town of Fulton, the place appointed for the holding of courts in and for the county of Calloway aforesaid, on the second day of our next June term of said circuit court, which term will commence on the first Monday in the said month of June next, then and there to answer to the demand of the President and Directors of the Bank of the Commonwealth of Kentucky, plaintiffs, as set forth and exhibited in the within copy of their petition, filed in said court, against him, the said Thos. W. Collier, Thos. Griffith and Elisha McClelland; and this you shall in no wise omit; and have you there this writ.

Witness, Irvine O. Hockaday, clerk of our said court, at office, [L. S.] this 6th day of May, A. D. 1834, and in the 14th year of the State.

IRVINE O. HOCKADAY, *Clerk.*"

Sheriff's Return.

Upon the foregoing, the sheriff made the following return, to wit:

"The within petition and summons was executed on the within named Thomas W. Collier, on the 10th day of May, 1834, by delivering him a copy thereof in Calloway county, Missouri—fee $1 00.

JAS. BASKETT,
Sheriff of Calloway County."

On the said 6th day of May, A. D. 1834, another summons, "a counterpart, issued upon the back of another true and attested copy of said original petition, directed to the sheriff of Montgomery county, against the defendant Thomas Griffith, which is in the words and figures following, to wit:"

Summons to Montgomery vs. Thomas Griffith.

COUNTERPART.

"STATE OF MISSOURI, *County of Calloway*, } ss.
First Judicial Circuit of said State. }

The State of Missouri to the sheriff of Montgomery county, greet-

ing: You are hereby commanded to summon Thomas Griffith, that he be and appear before the judge of our circuit court for the circuit and county of Calloway, aforesaid, at the court house in the town of Fulton, the place appointed for the holding of courts in and for the county of Calloway, aforesaid, on the second day of our next June term of said circuit court, which will commence on the first Monday in the said month of June next, then and there to answer to the demand of the President and Directors of the Bank of the Commonwealth of Kentucky, plaintiffs, as set forth and exhibited in the within copy of their petition filed in said court against him, the said Thomas Griffith and Thomas W. Collier and Elisha McClelland; and this you shall in no wise omit: and have you there this writ.

Witness, Irvine O. Hockaday, clerk of our said court, at office, [L. S.] this 6th day of May, A. D. 1834, and in the 14th year of the State.

IRVINE O. HOCKADAY, *Clerk.*

"STATE OF MISSOURI, *County of Calloway,* } *ss.*
First Judicial Circuit of said State. }

The above and foregoing summons is a counterpart of the summons which issued on the same day, in the same case, against Thomas W. Collier, directed to the sheriff of Calloway county, in an action upon petition and summons in debt, commenced in the Calloway circuit court, in favour of "The President and Directors of the Bank of the Commonwealth of Kentucky, plaintiffs, against Thomas Griffith, Thomas W. Collier, and Elisha McClelland, defendants.

Attest: IRVINE O. HOCKADAY,
Clerk of the Calloway Circuit Court."

Sheriff's Return.

Upon the foregoing summons, the sheriff made the following return, to wit:

"Served the within writ by delivering to the within named Thomas Griffith a true copy of the summons and petition, on the 15th day of May, 1834, in the county of Montgomery.

N. DRYDEN,
Sheriff of Montgomery C'ty. Mo."

And on the said 4th day of May, A. D. 1834, another summons, a counterpart, issued and was attached to a third true and attested copy of said original petition, directed to the sheriff of Saint Charles county, against the defendant Elisha McClelland, returnable to the second day of the then next succeeding June term of the said circuit

court; which said summons was never returned to the clerk's office by the sheriff, and is not now upon file.

At the time and on the day (to wit, on the 6th day of May, A. D. 1834) of the filing of the original summons aforesaid, the following bond for costs was filed in this case, to wit:

Bond for Costs.

"I, William Henry Russell, acknowledge myself bound to pay, or cause to be paid, all costs which have or may accrue in an action of debt, by petition and summons, brought by the President and Directors of the Bank of the Commonwealth of Kentucky against Thomas Griffith, Thomas W. Collier and Elisha McClelland, in the Calloway circuit, returnable to the June term of said court, 1834.

Given under my hand and seal this sixth of May, 1834.

WM. HENRY RUSSELL, [SEAL.]

And afterwards, to wit, at a circuit court, begun and held in and for the county of Calloway aforesaid, at the court house in the town of Fulton, in said county, on the first Monday of June, it being the 2d day of said month, in the year of our Lord one thousand eight hundred and thirty-four, present the honorable David Todd, judge of said court, in the record and proceedings of said court, on the third day of said term, to wit, on Wednesday the 4th day of said month of June, A. D. 1834, appears the following, to wit:

June Court, 1834.

"THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, plaintiffs, *against* THOMAS GRIFFITH, THOMAS W. COLLIER and ELISHA MCCLELLAND, defendants.	Upon petition and summons.

Three pleas filed—Special dem'r filed.

This day came the defendants, Thomas Griffith and Thomas W. Collier, by their attorney, and produced and filed herein three pleas; and also produced a special demurrer to the plaintiff's petition, which is also filed," after being amended by a subsequent order of the court, which will appear in its order.

The pleas alluded to in the following entry are in the words and figures following, to wit:

1st plea.

"THOS. GRIFFITH, THOS. W. COLLIER and ELISHA MCCLELLAND, *ads.* THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.	In Calloway Circuit Court, June term 1834.

And the said Thos. Griffith, Thos. W. Collier and Elisha McClelland, said defendants, come and defend the wrong and injury, when, &c., and say that they do not owe the said sum of money above demanded, or any part thereof, in manner and form as the said plaintiffs have above thereof complained against them, and of this they, the said defendants, put themselves upon the country, &c.

KIRTLEY & JEMISON,
Att'ys for Def'ts.

2d plea.

2d. And for a further plea in this behalf, the said defendants say, that they did make and execute the said note in said petition mentioned, as is by said plaintiffs alleged. Yet the said defendants aver, that the said note was made, given and executed by them to the said plaintiffs, without any good and valuable consideration whatever; wherefore they say the said note is null and void in law, to wit, at the county of Calloway, aforesaid, and this the said defendants are ready to verify. Wherefore, they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action against them.

KIRTLEY & JEMISON,
Att'ys for Def'ts.

3d plea.

3d. And for a further plea in this behalf, the said defendants say, that the President and Directors of the Bank of the Commonwealth of Kentucky, at their branch bank at Flemingsburg, before the 15th day of February, 1827, to wit, on the first day of February, 1827, to wit, at the county of Calloway, loaned the said Thomas Griffith bank paper or notes of the said Bank of the Commonwealth of Kentucky, signed by the president and countersigned by the cashier of said bank, and which bank paper or notes were issued and loaned by said bank as aforesaid, to wit, at the county of Calloway aforesaid, by authority and in pursuance of an act of the Legislature of Kentucky, entitled An Act to establish the Bank of the Commonwealth of Kentucky, and in which said bank paper or bank notes were then and there, to wit, on the said 1st day of February, 1827, at the said branch bank at Flemingsburg, to wit, at the county of Calloway aforesaid, transferred by the said plaintiff to the said Thomas Griffith, by delivery, and were then and there bottomed upon the credit issued in behalf of the State of Kentucky, and were bills of credit within

the meaning and prohibition of the Constitution of the United States, and the said defendants aver that the said note in the said petition mentioned was then and there at Flemingsburg, to wit, at the county of Calloway aforesaid, on the said 15th day of February, 1827, made and executed in consideration of the said illegal loan of said illegal bank paper as aforesaid, and for no other or different consideration whatever. Wherefore, they, the said defendants, say that the said note in said petition mentioned was, at the time of its execution, ever since, has been, and now is, null and void, to wit, at the county of Calloway aforesaid, and this they the said defendants are ready to verify; wherefore they pray judgment, if said plaintiffs ought to have or maintain their action aforesaid against them.

KIRTLEY & JEMISON,
Att'ys for def'ts.

The special demurrer also mentioned in the foregoing entry, as being filed, (being also amended under a subsequent order of the court, which will appear in due course,) is in the words and figures following, to wit:

Special Dem'r.

"THOS. GRIFFITH, THOS. COLLIER, AND ELISHA MCCLELLAND, *ats.* THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.	In the Calloway Circuit Court, June term, 1834.

"And the said Thos. Griffith and Thos. Collier and Elisha McClelland, said defendants, by their attorney, come and defend the wrong and injury, when, &c., and crave oyer of the said supposed note in the said petition mentioned, and it is read to them in these words, to wit:

"NICH'S COUNTY, *Feb'y 15th*, 1827.

"$550.

"One hundred and twenty days after date, we jointly and severally promise to pay the President and Directors of the Bank of the Commonwealth of Kentucky, or order, five hundred and fifty dollars, negotiable and payable at their branch bank at Flemingsburg, for value received. Witness our hands.

THOS. GRIFFITH,
THOS. W. COLLIER,
ELISHA McCLELLAND."

Which being read and heard, the said two defendants say that the said petition and the matters therein contained, in manner and form as

the same are above stated and set forth, are not sufficient, in law, for the said plaintiffs to have or maintain their aforesaid thereof against them, the said two defendants; and that the said two defendants are not bound, by the law of the land, to answer the same, and this they are ready to verify; wherefore, for want of a sufficient petition in this behalf, the said two defendants pray judgment, and that the said plaintiffs may be barred from having or maintaining their aforesaid action thereof against them; and the said two defendants state and shew to the court here the following causes of demurrer to the said petition, that is to say—1st, that there is no venue laid either in the body or caption of said petition; 2d, that there is no term of the court specified or set forth in said petition, or in the caption thereof, to which the said petition or suit is brought; and 3d, that there is a material variance between the note set out in the said petition, and the note read upon oyer craved as aforesaid in this, to wit: that the first person set out in said petition, and also, the first person set down in said petition as having signed and executed said note, is Thomas Griffith; whereas the first person whose name is first signed to said note, read here upon oyer craved as aforesaid, as having executed the same, is Thos. Griffith; and also, that the said petition is, in other respects, uncertain, informal, and insufficient, &c.

KIRTLEY & JEMISON,
Att'ys for def'ts.

Joinder in Dem'r.

"The plaintiff, by his attorney, joins in demurrer.

WELLS, *Att'y for pl'ff.*"

Afterwards, to wit: at the same circuit court continued and held at the same place, on the day and year last aforesaid, in the record and proceedings of said day, appears the following, to wit:

Issue to Dem'r—Dem'r Argued.

"The President and Directors of the Bank of the Commonwealth of Kentucky, plaintiffs, *against* Thomas Griffith, Thos. W. Collier, and Elisha McClelland, defendants.	Upon petition & summons.

This day came the parties aforesaid, by their attornies; and thereupon the plaintiffs aforesaid, by their attorney, joined issue to the special demurrer of the defendants, Griffith and Collier, to the said plaintiffs' petition. Whereupon the said demurrer was heard and argued on the part of both parties, and mature deliberation being hereupon had, it is considered by the court that the same be overuled."

And afterwards, at the same circuit court continued and held at the same place, on the same day and year aforesaid, the following proceedings were had, to wit:

Issue to 1st plea filed—Repl's to 2d and 3d pleas filed, and issue thereto.

"THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, plaintiffs, *against* THOMAS GRIFFITH, THOS. W. COLLIER, AND ELISHA MCCLELLAND, defendants.	Upon petition & summons.

This day came the parties aforesaid, by their attornies, and thereupon the plaintiffs, by their attorney, join issue to the first plea of the defendants, Griffith and Collier, filed herein; the said plaintiffs also produced and filed their several replications to the second and third pleas of the said defendants; to which said replications, the said defendants, Griffith and Collier, by their attorney, joined separate issues."

The issue joined, the replications and joinders thereto referred to in the foregoing entry, after being amended under a subsequent order of the court, which will appear in its place, are in the words and figures following, to wit:

Joinder to 1st plea.

"THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY,
vs.
THOMAS GRIFFITH, THOMAS W. COLLIER, ELISHA MCCLELLAND.

And the said plaintiffs, as to the plea of the said defendants, Thomas Griffith, Elisha McClelland, and Thomas W. Collier, by them first above pleaded, and wherein the said defendants have put themselves upon the country, doth the like.

WELLS, LEONARD & RUSSELL,
Att's for plt'ffs.

Repl. to 2d Plea.

And the said plaintiffs, as to the plea of the said defendants' Thomas Griffith, Elisha McClelland, and Thomas W. Collier,

secondly by them pleaded, say, that they, the said plaintiffs, ought not, by reason of any thing by the said defendants in that plea alleged, to be debarred or precluded from having and maintaining there aforesaid action thereof against them, the said defendants, because they say that the said note in the plaintiffs' said petition mentioned, was made, given, and executed, by the said defendants to the said plaintiffs, upon and for a good and valuable consideration given by the said plaintiffs to the said defendants, to wit: on the said fifteenth day of February, in the year eighteen hundred and twenty-seven, to wit, at the county of Calloway aforesaid; and of this, they, the said plaintiffs, put themselves upon the country.

WELLS, LEONARD & RUSSELL,
Atto's for plt'ffs.

Joinder.

"And the said defendants doth the like.
KIRTLEY & JEMISON."

Repl'n to 3d Plea.

"And the said plaintiffs, as to the plea of the said defendants, Thomas Griffith, Elisha McClelland, and Thomas W. Collier, by them thirdly above pleaded, say that they ought not, by reason of any thing in that plea by the said defendants alleged, to be barred or precluded from having and maintaining there aforesaid action thereof against them, the said defendants, because they say that the said bank paper or bank notes in the said plea mentioned, were not bottomed upon the credit of the said state of Kentucky, and were not issued in behalf of the said state, and were not bills of credit, within the meaning and prohibition of the constitution of the United States, in manner and form as the said defendants have in there said plea alleged, and of this they put themselves upon the country.

WELLS, LEONARD & RUSSELL,
Atto's for Pl't'ffs.

Joinder to Repl. to 3d Plea.

"And the said defendants doth the like.
JEMISON & KIRTLEY."

And afterwards at the same circuit court, continued and held at the same place, on Thursday the fifth day of June, A. D. 1834, (being the fourth day of the term,) the following entry was made, to wit:

"THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, *Plaintiffs*, *against* THO'S GRIFFITH, THO'S W. COLLIER, AND ELISHA MCCLELLAND, *Def'ts.* } Upon petition and summons.

Alias Summons awarded vs. Elisha McClelland, and Cause continued.

This day came the plaintiffs aforesaid by their attornies, and, on *his* motion, it is ordered that an alias summons issue herein against the said defendant, Elisha McClelland, to be directed to the sheriff of St. Charles county, returnable here, &c.; and the cause is continued until the next term of this court."

And, in obedience to the foregoing order, an alias summons issued on the 14th day of June, A. D. 1834, against the said defendant, Elisha McClelland, directed to the sheriff of Saint Charles county, which was attached to a true and attested copy of the aforesaid original petition, and is in the words and figures following, to wit:

Alias Sum's vs. *Elisha McClelland.*

"STATE OF MISSOURI, COUNTY OF CALLOWAY,
First Judicial Circuit of said State, ss:

The State of Missouri to the Sheriff of Saint Charles County, greeting:

You are hereby again commanded to summon Elisha McClelland that he be and appear before the judge of our circuit court for the circuit and county of Calloway aforesaid, at the court house in the town of Fulton, the place appointed for the holding of courts in and for the county of Calloway aforesaid, on the second day of our next October term of said circuit court, which term will commence on the first Monday in the said month of October next, then and there to answer to the demand of the president and directors of the Bank of the Commonwealth of Kentucky, plaintiffs, as set forth and exhibited in the within copy of their petition filed in said court against Thomas Griffith, Thomas W. Collier, and him the said Elisha McClelland; and this you shall in no wise omit, and have you then there this writ.

Witness Irvine O. Hockaday, clerk of our said court,
[SEAL.] at office, this 14th day of June, A. D. 1834, and in the 14th year of the State.

IRVINE O. HOCKADAY, *Clerk.*

Upon the foregoing alias summons, the sheriff made the following return, to wit:

"By virtue of the within writ to me directed, I summoned the within named Elisha McClelland to be and appear at court as by this writ is required, this 1st day of September, A. D. 1834, by delivering him a true and attested copy of the within petition and summons in the town and county of Saint Charles, Missouri.

WM. M. CHRISTY,
Sheriff of St. Charles County.

Sh'ff's fee, per service, $1 00.

And afterwards, to wit, at a circuit court begun and held in and for the county of Calloway aforesaid, at the court house in the town of Fulton, in said county, on the first Monday of October, it being the sixth day of said month, in the year of our Lord one thousand eight hundred and thirty-four, present the Honourable David Todd, judge of said court, in the record and proceedings of said court, on the third day of said term, to wit, on Wednesday the 8th day of said month of October, A. D. 1834, appears the following, to wit:

Leave to Am'd Pleadings of both Parties.

"THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, *Plaintiffs*, *against* THOMAS GRIFFITH, THOMAS W. COLLIER, AND ELISHA MCCLELLAND, *Defendants*. } Upon petition and summons.

Now at this day comes the parties aforesaid by their attornies, and by consent of the said parties it is ordered by the court that the pleas of the defendants, Thomas Griffith and Thomas W. Collier, filed herein at the last term of this court, be so amended by inserting the name of the defendant, Elisha McClelland, that they may thereby be made the joint pleas of all the defendants in this cause, and, on motion of the plaintiffs, and by consent of the defendants, the same leave is given them to amend their replications filed herein to said pleas of the defendants, all of which amendments are accordingly made."

And afterwards, at the same circuit court, continued and held for the circuit and county aforesaid, at the same place, on Thursday the ninth day of October, A. D. 1834, being the fourth day of the said term, and before the same judge, the following proceedings were had, to wit:

"THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, Plaintiffs,
against
THOS. GRIFFITH, THOS. W. COLLIER, AND ELISHA McCLELLAND, Defen'ts.

Submission—Trial.

This day, came the parties aforesaid by their attornies, and neither requiring a jury, by consent, all and singular the premises in this case were, by the said parties, submitted to the court upon trial, which, together with the arguments of the attornies on the part of both parties, *was* seen and heard by the court, but the court not being sufficiently advised of and concerning the same, took time to consider thereof."

And afterwards, at the same circuit court, continued and held for the circuit and county aforesaid, before the same judge, and at the same place, on Friday the 10th day of October, A. D. 1834, being the fifth day of the said October term of said court, the following proceedings were had, to wit:

Finding for the plaintiffs.

"THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, Plaintiffs,
against
THOMAS GRIFFITH, ELISHA McCLELLAND AND THOMAS W. COLLIER, Defendants.

Upon petition and summons.

This day came the parties aforesaid, by their attornies, and thereupon the court, sitting as jury, being now sufficiently advised of and concerning the case, doth find, upon the issue joined between the parties aforesaid, upon the plea of the defendants, by them first above pleaded, that the said defendants do owe the said sum of money above demanded, in manner and form as the said plaintiffs have above thereof complained against them: and as to the issue joined between the said parties, upon the plea of the said defendants, secondly by them pleaded, the court, sitting as a jury, finds that the said plaintiffs ought not, by reason of any thing by the said defendants in that plea alleged, to be barred or precluded from having and maintaining their aforesaid action thereof against them the said defendants, because the court finds that the said note in the plaintiffs' said petition mentioned was made, given and executed by the said defendants to the said plaintiffs, upon and for a good and valuable consideration, given by the said plaintiffs to the said defendants, to wit, on the said fifteenth day of February, eighteen hundred and twenty-seven, to wit, at the county of Calloway aforesaid; and as to

the issue joined between the parties aforesaid, upon the plea of the said defendants, by them thirdly above pleaded, the court finds that the said plaintiffs ought not, by reason of any thing in that plea by the said defendants alleged, to be barred or precluded from having and maintaining their aforesaid action thereof against the said defendants, because the court finds that the said bank paper or bank notes, in the said plea mentioned, were not bottomed upon the credit of the said State of Kentucky, and were not issued in behalf of said State, and were not bills of credit, within the meaning and prohibition of the Constitution of the United States, in manner and form as the said defendants have, in their said third and last plea alleged; and thereupon, the court finds that the said plaintiffs ought to recover against the said defendants the said sum of five hundred and fifty dollars, the debt in their petition mentioned, and such damages as they may have sustained by reason of the detention of said debt, which, with the assent of the parties aforesaid, the court sitting as a jury, as aforesaid, doth assess at the sum of two hundred and forty-one dollars and fifty-four cents. Therefore it is considered by the court that the plaintiffs aforesaid recover against the said defendants the said sum of five hundred and fifty dollars, the debt aforesaid in their said petition mentioned, and the said sum of two hundred and forty-one dollars and fifty-four cents, the damages aforesaid by the court assessed as aforesaid, for the detention of said debt, and also their costs and charges by them, about their suit, in this behalf laid out and expended, and that they have thereof execution.

And afterwards, at the same circuit court, continued and held at the same place, on the day and year last aforesaid, before the same judge, the following proceedings were had, to wit:

"The President and Directors of the Bank of the Commonwealth of Kentucky, Plaintiffs, *against* Thomas Griffith, Elisha McClelland and Thomas W. Collier, Defendants. } Upon petition and summons.

Def't's motion for new trial.

This day came the defendants aforesaid by their attornies, and entered their motion herein for a new trial in this case, and produced and filed their reasons therefor, which are as follows, to wit:

Reasons for new trial.

"Thomas Griffith & others *ads.* President & Directors of the Bank of the Commonwealth of Kentucky. } In the Calloway circuit court, October term, 1834.

And the said defendants moves the court, here, to set aside the

judgment in the above cause, and grant them a new trial for the following reasons, to wit: because the finding of the court sitting as a jury is against law and against the evidence produced in this cause, because the finding of the court sitting as a jury, as aforesaid, is against the defendants, whereas it should have been for the defendants, because the judgment rendered in this cause is against law. JEMISON & KIRTLEY, *Atto's for Defts.*

Motion for new trial overruled.

" Which motion being heard, and maturely deliberated upon, it is considered by the court that the same be overruled; to which opinion and decision of the court the defendants, by their attornies, except, and produce, here, their bill of exceptions, which were examined, signed, and sealed by the court, and ordered to be filed and entered as a part of the record in this cause, as follows, to wit:

Bill of exceptions filed.

" THE PRESIDENT & DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY, *vs.* THOMAS GRIFFITH, THOMAS COLLIER, & ELISHA M'CLELLAND.	October term, Calloway Circuit Court, 1834.

Bill of exceptions.

Be it remembered that at this term of the court, on the trial of the above cause, neither party requiring a jury, the court tried the issues between the parties sitting as a jury, & upon said trial the plaintiffs offered in evidence the following acts of the General Assembly of the Commonwealth of Kentucky, to wit: An act entitled " An act to establish the Bank of the Commonwealth of Kentucky (" here insert it from page 55 to 65 inclusive") and it is as follows, between these pages, to wit:

Kentucky statute.

" (55)"

" CHAP. XLIX."

" An act to establish the bank of the Commonwealth of Kentucky, approved November 29, 1820.

" Whereas it is deemed expedient and beneficial to the State and the citizens thereof, to establish a bank on the funds of the State, for the purpose of discounting paper, and making loans for longer periods than has been customary, and for the relief of the distresses of the community. Therefore,

Sec. 1. Be it enacted by the general assembly of the Commonwealth of Kentucky, that a bank shall be, and the same is hereby established, in the name and on behalf of the Commonwealth of Kentucky, in the town of Frankfort, under the direction of a president and twelve directors, to be chosen by joint ballot of both houses of the general assembly, who shall continue in office until the next stated session of the general assembly, and until their successors, chosen in like manner, are appointed to act; and the said president and directors shall appoint a cashier, clerks, and other persons necessary to aid in conducting the same, and they shall take from the said cashier, annually, bond with sufficient security in the penalty of not less than one hundred thousand dollars, payable to the Commonwealth, for his good behaviour, and for the faithful discharge of the duties of his office.

"Sec. 2. The president and directors of the said bank, elected in the manner aforesaid, and their successors in office, shall be, and are hereby, made a corporation and body politic in law and in fact, by the name and style of the President and Directors of the Bank of the Commonwealth of Kentucky, and shall so continue until the first day of January one thousand eight hundred and forty-one; and by the name and style aforesaid, they shall be, and are hereby made able and capable, in law, to have, purchase, receive, possess, enjoy, and retain, to themselves and their successors, lands, rents, tenements, hereditaments, goods, and chattles of what kind, nature, or quality, soever, and the same to sell, grant, alien, demise, and dispose of; to sue, and be sued, plead, and be impleaded, answer, and be answered, defend, and be defended, in courts of record or any other place whatsoever; and also to make, have, and use, a common seal, and the same to break, alter, and renew, at pleasure; and also to ordain, establish, and put into execution, such by-laws, ordinances, and regulations as shall seem necessary and convenient for the government of the said corporation, not being contrary to the law or constitution hereby established; and generally to do and execute all, and singular, such acts, matters, and things, which to them it shall and may apportion to do—subject, nevertheless, to the rules, regulations, restrictions, and provisions in this act.

Sec. 3. The whole capital stock of said bank shall be exclusively the property of the Commonwealth of Kentucky, and no individual or corporation shall be permitted to own, or pay for, any part of the capital of said bank.

Sec. 4. That the said president and directors shall have power to issue notes signed by the president, and countersigned by the cashier, not under the denomination of one dollar, nor over one hundred dollars, on behalf of said corporation, for such sums, and with such devices as they may deem most expedient and safe. They shall also be capable of exercising such other powers and authorities as may be necessary for the well government and ordering the affairs of said corporation, and of promoting its interest and credit.

Sec. 5. That the capital stock of said bank shall be two millions

of dollars, to be raised and paid in the following manner, to wit: all monies hereafter paid into the Treasury for the purchase of the vacant lands of the commonwealth, all monies hereafter paid into the Treasury for the purchase of land warrants, all monies which may hereafter be raised for the sale of the vacant lands west of the Tennessee river, and so much of the capital stock owned by the State in the Bank of Kentucky as may belong to the State after the affairs of said bank shall be settled up, with the profits thereof not heretofore pledged or appropriated by law, shall be exclusively appropriated to the making up the capital stock of said bank; and the treasurer of this commonwealth shall, and he is hereby required, from time to time, as he may receive moneys on all or any of the accounts aforesaid, to pay the same over to the said bank, and take the cashier's receipt therefor, and file the said receipt with the auditor of public accounts, who shall thereupon pass a quietus to the Treasurer.

Sec. 6. That in case of the death, resignation, removal, or refusal to act, of the said president, or either of the directors, a majority of those remaining in office shall fill up such vacancy: and the persons so appointed shall hold their office during the remainder of the term, for which the president or director, so *so* dying, resigning, removing or refusing to act, had to serve.

Sec. 7. That none of the said officers shall become security or be bound for any debt contracted for or on behalf of the said bank, except his or their own accommodation; and each and every officer concerned in the said bank shall, before he enters on the duties of his said office, take the following oath before some circuit judge or justice of the peace:

I, A. B., do solemnly swear (or affirm, as the case may be) that I will faithfully discharge the duties assigned me, according to the best of skill and abilities, and that I will not directly or indirectly, for myself or others, loan the funds of the said bank at a greater interest than is allowed by law during my continuance in office: so help me God.

Sec. 8. That the said bank shall receive money on deposite, and pay away the same to order, free of expense, discount bills of exchange, current money, and notes with two or more good securities, who shall be jointly and severally bound at a rate of interest not exceeding one per cent. for sixty days, and shall have power to make loans to citizens of the State, in the nature of discounts on real estate, secured by mortgage, with power to make sale of said estate in default of payment: Provided, That the sum so loaned shall never exceed one-half of the real unincumbered value of the property so mortgaged: Provided, further, That the loans shall never be for a longer period than one year, nor draw a greater interest than at the rate of six per cent. per annum, which shall always be payable in advance: And provided, further, That no loan shall in any case be renewed unless the interest for such reloan shall be paid in advance. And provided, further, That the directors for the time being shall not call

in more than one-tenth of each loan at the time the same shall become due, without giving sixty days' notice thereof; and all and every person or persons failing to make payment shall be deprived in future of credit in said bank, and shall be liable to suit immediately for the amount due.

Sec. 9. And be it further enacted, That the total amount of debts which the said bank shall at any time owe, whether by bond, bill, note, or contract, shall not exceed double the amount of the capital stock of said bank; and in case of excess, the directors, under whose administration it shall happen, shall be liable for the same in their private and individual capacities, and an action of debt may in such case be brought against them or any of them, their or any of their heirs, executors or administrators, in any court in this State having jurisdiction, by any creditor or creditors of said corporation, and may be prosecuted to judgment and execution, any condition, covenant or agreement to the contrary notwithstanding; but this shall not be construed to exempt the said bank, or the lands, tenements, goods or chattels of the same from being also liable for, and being chargeable with said excess.

Sec. 10. That not less than seven directors shall constitute a board to do business, of whom the president shall always be one, except in case of sickness or necessary absence, in which case his place may be supplied by any other director, who may be selected by the directors, or a majority of them.

Sec. 11. And be it further enacted, That it shall be the duty of president and directors of said bank to make such arrangements and regulations as will secure to the citizens of such county in this State a just proportion of the capital aforesaid to be loaned, which proportion shall be ascertained agreeably to the taxes to be paid by each county into the public Treasury, for the year one thousand eight hundred and twenty; and when any payment shall be made into the bank hereby established, it shall be the duty of the president and directors thereof so to conduct the proceedings as not to reloan to citizens of any county the same, or any part thereof, originally intended for another county, but the sum or sums thus paid in may from time to time be reloaned to citizens of the same county, so long as may be consistent with the interest and safety of the institution hereby established; and the said president and directors shall not receive, in discharge of loans made by them, any thing but the notes hereby created, specie, or the notes of such banks as shall be at par at the time such loans are payable.

Sec. 12. That no person who may be a president or director of any other bank, or a stockholder of the United States Bank, shall be eligible to the office of president or director to the bank hereby created.

Sec. 13. That it shall be the duty of the president of said bank to cause an accurate and detailed report of their proceedings and situation to be made to each session of the General Assembly, and during the first week thereof, setting forth in said report the names

of the persons borrowing money, and the amount so borrowed, and the manner in which the same is secured.

Sec. 14. That the president of said bank shall be allowed the sum of fifteen hundred dollars per annum, payable half yearly; and the cashier of said bank shall be allowed the sum of twelve hundred dollars per annum, payable as aforesaid; and the president and directors shall make such allowance to their clerks as they may think right, not exceeding the amount to be paid the cashier, payable as aforesaid.

Sec. 15. That no loan to any individual shall exceed the sum of one thousand dollars, except to the directors and the president of the principal bank, and any branch thereof, who may severally borrow from said bank any sum not exceeding two thousand dollars, upon the same terms and conditions as other individuals.

Sec. 16. The president and directors shall keep fair and regular entries (in a book or books to be kept for that purpose) of their proceedings; and on any question where two directors shall require it, the yeas and nays of the directors shall be duly inserted on their minutes, and those minutes be at all times, on demand, produced to the legislature, or any committee thereof who may be legally authorized to receive the same.

Sec. 17. That the bills or notes of the said bank shall be receivable at the treasury of this State, and by all the tax-gatherers and other public officers, in all payments for taxes or other moneys now due, or to become due to the State, and by all collectors of the county levy; and all the notes issued by said bank shall be payable and redeemable in gold and silver.

Sec. 18. That the value of the property mortgaged under this act shall be ascertained to the satisfaction of the president and directors; and, in order to secure the president and directors more effectually from imposition, any person or persons who shall apply to them for moneys on loan shall produce to the board, for their inspection, a clear and valid title, in fee simple, to the property proposed to be mortgaged, which said property shall be valued upon oath by commissioners appointed for that purpose; and such person or persons so applying to borrow money of said bank, during the year one thousand eight hundred and twenty-one, shall state distinctly, on oath, the use for which said money is intended: Provided, nevertheless, that said bank shall not loan any money to any individual or individuals during the said year one thousand eight hundred and twenty-one, except for the purpose of paying his, her, or their just debts, or for the purpose of purchasing the live stock or produce of the country for exportation.

Sec. 19. Be it further enacted, That the mortgage to be taken as security in this bank may be taken in the following form, in substance, to wit: I, A. B., do assign over, and transfer to the president and directors of the Bank of the Commonwealth of Kentucky, (here describe the lands particularly,) which land I declare to be in mortgage for the payment of ——— dollars, with legal interest, at

six per cent. per annum from the day of ———; and I do agree that the same may be exposed to sale, if I do not pay the principal and interest at the time when the same may become due and payable. Witness my hand and seal this ——— day of ———, 18—. Which mortgage shall be accompanied with a note or bond for the sum so borrowed, and shall be valid to all intents and purposes.

Sec. 20. That all mortgages taken for loans of money under this act shall be considered as being recorded from the date thereof, and shall have priority of any mortgages or conveyances of the same property not previously recorded in the county in which the land lies. And the person or persons applying for a loan of money shall produce a certificate from the clerk of said county in which the land lies, that there is no conveyance or incumbrance upon said land in his office; and shall, moreover, make oath before the cashier of said bank or branches, before he shall be entitled to receive the money or amount of the discount which he may obtain on the mortgage of said land, that there is no incumbrance or better claim in law or equity, that he knows of or believes, on the said land: Provided, however, that the mortgage so taken by the bank shall be recorded within thirty days after the execution thereof in the county in which the land so mortgaged lies.

Sec. 21. That the president and directors of said bank shall establish one branch thereof, and no more, in each judicial district in this commonwealth existing at the end of the present session of the General Assembly, except the judicial district in which the principal bank may be located; in which judicial district, no branch shall be located for the purpose of discount and deposit, and shall annually appoint a president and eight directors and other officers of such branches, and fix their salaries and prescribe their duties; and shall allott to the said branches a due proportion of the active capital of said bank, according to the eleventh section of this act.

Sec. 22. That the bills and notes under the seal of said corporation, which shall be made to any person or persons, shall be assignable by endorsement thereupon, under the hand or hands of such person or persons of his, her, or their assignee or assignees, and so as absolutely to transfer and vest the property thereof in each and every assignee or assignees successively; and to enable such assignee or assignees to bring and maintain an action thereupon in his, her, or their own name, or names, and bills or notes which may be issued by order of the said corporation, signed by the president, and countersigned by the principal cashier, promising the payment of money to any person or persons, his, her, or their order, or to bearer, though not under the seal of said corporation, shall be binding and obligating upon the same in the like manner, and with the like force and effect, as upon any private person or persons, if issued by him, her, or them, in his, her, or their private or natural capacity or capacities, and shall be assignable and negotiable in like manner as if they were so issued by such private person or persons; that is to say, those which are, or shall be, payable to any person or persons,

his, her, or their order, shall be assignable by endorsement in like manner, and with the like effect, as foreign bills of exchange now are; and those which are or shall be payable to bearer shall be negotiable and assignable by delivery only.

Sec. 23. That no president, directors, officer or servant, of the said corporation, shall be concerned, either directly or indirectly, in the practice of advancing or loaning out the funds of the institution at an illegal rate of interest, whether the same be done or effected under the form or color of a purchase or exchange of notes, acceptances or due bills, checks on banks, acknowledgments, or any other way or manner whatsoever; and all and every such president, director, officer, clerk or servant, of said bank, who shall be concerned as aforesaid in any such practices, shall forfeit and pay for each offence one thousand dollars, to be recovered by an action of debt in any court of record having jurisdiction of the offence, one half to the use of the informer, the other half to the use of the state.

Sec. 24. That all the interest arising from the loans and discounts which may be made by the said bank, after the payment of the necessary expences, shall constitute and be considered as a part of the annual revenue of the state, and subject to the disposition of the legislature.

Sec. 25. That in all cases where the amount loaned shall be in arrear or due, the president and directors of the said bank shall be, and they are hereby authorized and empowered (if they shall think fit) to advertise the mortgaged property for sixty days in one or more newspapers printed in this State, and make sale of so much of the mortgaged premises to the highest bidder for cash or notes of said bank as will pay the amount due; and the president and directors are fully authorized and empowered to make conveyances for the same to the purchasers thereof, or buy the same in, if they shall think fit, for the benefit of the institution.

Sec. 26. That the president and directors of the said bank shall have power to appoint five commissioners in each county to value and appraise the lands which may be offered in mortgage to the bank, and every valuation of land in any county shall be signed by three of the commissioners, and the president and directors shall have power to fill up all vacancies or to remove any such commissioners at pleasure.

Sec. 27. That the assessors appointed by the psesident and directors of the said bank, to value lands to be mortgaged to said bank, shall receive each for their services not exceeding one dollar per day, to be paid by those who borrow money from said bank.

Sec. 28. That the treasurer of this commonwealth be and he is hereby authorized and required to furnish the president and directors of the said bank with such sum or sums of money as may be sufficient to procure plates and other things necessary to carry the said bank into full and complete operation, not exceeding seven thousand dollars.

Sec. 29. The general assembly shall and may from time to time

make such changes and alterations in the constitution of said bank as may be deemed proper and expedient.

Sec. 30. No loan shall be made by said corporation to any government or State, except the commonwealth of Kentucky, nor to any person or persons residing in any other government, state, or territory, or to any corporation or body politic chartered or incorporated by this or any other government.

Sec. 31. The president and directors of the principal bank shall prescribe the form of the notes to be executed by the persons borrowing money of said bank, or the branches thereof; and whenever a loan may be made to any person or persons, the person whose name is first subscribed to the note of hand shall have the right to control the amount loaned by his check or otherwise, and the notes so executed may be put in suit by the said bank at any time they may think proper after they become due; and all such notes of hand shall be debts of superior dignity, and shall be paid first by executors and administrators.

Sec. 32. The cashier of the branches, respectively, shall annually execute bonds to the commonwealth in the penalty of not less than fifty thousand dollars, with two or more securities, to be approved of by the president and directors of the bank to which he may belong, conditioned for the faithful discharge of the duties of his office; and the president, directors, and all other officers of the branches, shall possess the same qualifications and take the same oath which is required to be taken by the officers of the principal bank.

Sec. 33. The president and directors of the said bank shall cause the said bank and branches to be put into full and complete operation on or before the first day of May next, or otherwise, as soon as practicable.

Sec. 34. Be it further enacted, That the several branches established agreeably to the provisions of this act shall, immediately after the first day of October in each year, (and oftener, if required by the president and directors of the principal bank,) report the amount of all loans, and the names of the individual borrowers, and how the same is secured.

Sec. 35. That the notes of the principal banks of Kentucky shall be received in payment of all debts due the bank hereby established; and the revenue of this commonwealth unappropriated at the close of the present session of the General Assembly, also the revenue hereafter collected which may remain in the treasury unappropriated, annually, shall constitute a part of the capital stock of said institution, and shall be paid over to the cashier of the bank, by the treasurer, subject to such appropriation as may be made from time to time by law.

Sec. 36. Be it further enacted, That the total amount of notes issued and debts contracted by the institution shall not exceed two millions of dollars, previous to the next session of the legislature.

Sec. 37. Be it further enacted, That no person who shall be a member of the present legislature at the passage of this bill shall

beeligibleto the office of president, director, cashier or clerk of the said bank, or any of its branches, until twelve months after his term of service shall have expired; and when any officer in said bank shall be elected to either branch of the legislature, he shall thereby vacate his office in said corporation."

End of the Ky. Statute Bill of Ex. Cont.

"Also, an act entitled 'An act supplementary to an act to establish the Bank of the Commonwealth of Kentucky," (here insert it, from page 165 to 170, inclusive,) and between those pages it is as follows, to wit:

Supplementary Statute of Ky.

"(165)"

"CHAP. CXXXVIII."

An act supplementary to "An act to establish the Bank of the Commonwealth of Kentucky." Approved December 22, 1820.

Sec. 1. Be it enacted, by the general assembly of the Commonwealth of Kentucky, that a branch of the "Bank of the Commonwealth of Kentucky" shall be, and is hereby, established and located for the first judicial district in the town of Flemingsburg; for the second, in the town of Falmouth; for the third, in the town of Lexington; for the fifth, in the town of Louisville; for the sixth, in the town of Hartford; for the seventh in the town of Princeton; for the eighth, in the town of Greensburgh; for the ninth, in the town of Harrodsburg; for the tenth, in the town of Winchester; for the eleventh, in the town of Mountsterling; and, for the twelfth, in the town of Somerset: and each of said branches shall be styled the Branch of the Bank of the Commonwealth of Kentucky at ——— (here add to the style of the branch the name of the town in which the same may be located.)

Sec. 2. And be it further enacted, That the general assembly shall, at their present session, and each subsequent annual session, elect a president, and eight suitable persons as directors, to manage and superintend each of the said branch banks; any four of whom, together with the president, or, in the event of his absence, any five of whom, shall have power to transact the business of the said branch bank. The president and directors, and other officers of each branch, shall, at the time of election, reside within the district to which the branch over which they preside belongs; and in the event of a vacancy happening, by the death, resignation, removal, refusal to act, or otherwise, of the president or either of the directors of any of the said branch banks, a majority of those remaining in office shall fill up such vacancy; and the person or persons so appointed shall hold their office during the remainder of the term for

which the president or directors so dying, resigning, removing, or refusing to act, or otherwise vacating his office, had to serve. The president, directors and officers of the said branch banks shall, each and every of them, be subject to the same conditions, restrictions, limitations and penalties as are imposed on the president, directors and officers of the principal bank; provided, the salaries of any of the officers of the said branch banks which may be allowed under the provisions of this act, or the act to which this is a supplement, shall not commence until the branch of which they are officers shall have commenced banking; and provided, also, that the board of directors of any of the branch banks shall not allow their cashier more than eight hundred dollars per annum, nor their clerk more than six hundred dollars per annum.

Sec. 3. And be it further enacted, That the president and directors of each branch bank are hereby authorized to appoint a cashier to their respective branches, and a clerk, should the business of the institution require the appointment of a clerk; and the persons so appointed cashier or clerk shall hold their respective offices during good behaviour, subject, however, to be removed by joint resolution of both branches of the legislature, or by the president and directors of the branch to which they belong, two thirds of the board of directors concurring in such removal. Every cashier and clerk so appointed shall (before entering upon the duties of their respective officers) take the same oath which is required by the act to which this is a supplement.

Sec. 4. And be it further enacted, That neither the cashier nor clerks of the principal bank or branches, shall have any individual or private account current with the institutions to which they may respectively belong, except in relation to the salaries of such officers.

Sec. 5. And be it further enacted, That nothing in the ninth section of the act to which this is a supplement shall be so construed as to charge or render liable, in his individual capacity, any president or director of the principal bank, or any branch thereof, if such president or director was necessarily absent, or, being present at the board, dissented from and protested against the acts prohibited by said section.

Sec. 6. And be it further enacted, That the president and directors of the principal bank may issue notes to a larger amount than is provided by the thirty-sixth section of the act to which this a supplement, before the next session of the legislature: Provided, a majority of the directors elected concur therein; and provided that the amount issued before the next session shall not, on any pretence, exceed the amount of three millions of dollars: and if the amount reserved in the principal bank, or any *or any* branch, for loan, shall not be loaned in four months after said bank or branch shall have been put in operation, then, and in that case, the president and directors of such bank or branch may loan to individuals larger sums than is provided by the fifteenth section of the act to which this is a supplement, but shall not loan to any individual a larger sum than

two thousand dollars; and no individual shall have more on loan than the sum aforesaid at one time.

Sec. 7. And be it further enacted, That whosoever shall alter, forge or counterfeit any bill or note of the Bank of the Commonwealth of Kentucky, or shall erase or alter the same, or any endorsement thereon, or shall tender in payment, utter, vend, exchange or barter any such altered, forged or counterfeited bill or note, or the endorsement thereon, knowing it to be such, or shall knowingly demand to have the same exchanged, with intention to defraud, and *and* all and every person who shall be accessary to any of the aforesaid offences, shall undergo a confinement in the jail and penitentiary for any period not less than two years, nor more than ten years.

Sec. 8. And be it further enacted, That any property which may be sold under the twenty-fifth section of the act to which this is a supplement, whether the same may be purchased by an individual or by the corporation, shall be redeemable by the former owner at any time within two years, upon his paying into the principal bank, or the branch bank in which the debt may have been created, the amount for which the said property may have been sold, with an interest thereon, at the rate of ten per cent. per annum from the time of sale to the day of redemption; and it shall be the duty of the cashier to receive the amount from the former owner, and give him a certificate of the redemption thereof, and shall, on application, pay the amount of money received on such redemption to the purchaser, his heirs, executors, administrators or assigns, or lawful agent; and the president and directors, under whose order any such property may be sold, shall not make any conveyance thereof to any purchaser until after the expiration of two years from the time of sale.

Sec. 9. And be it further enacted, That where any new county or counties have, or may be formed, and no list and valuation of taxable property for said county or counties may be returned, so as to show the amount of taxes to be paid in such county or counties for the year one thousand eight hundred and twenty, it shall and may be lawful for the president and directors for the principal bank, in appropriating the amount of active capital to be employed in said county or counties, to take for their guide the list which may be made out under the revenue laws in the year one thousand eight hundred and twenty-one.

Sec. 10. And be it further enacted, That neither the president nor any director or other officer of the principal bank, or any branch thereof, shall be bound as security for any debt contracted with said principal bank, or any branch thereof.

Sec. 11. Be it further enacted, That whenever the president and directors of the mother bank, or any of its branches, shall think it expedient to loan larger sums than one thousand dollars, as provided in the sixth section of this act, they shall not loan any money which belongs to any one county, agreeable to the apportionment in the original bill, except to the citizens of said county.

Sec. 12. And be it further enacted, That when a director, either

for the principal bank or any of its branches, shall be chosen from a county in which the principal or branch is not located, said director's accommodation shall be deducted from the sum allotted to be loaned in the county from which such director is taken.

Sec. 13. Be it further enacted, That so much of the eighteenth section of the act to which this is a supplement as requires the applicant to make oath for what purpose he wishes to obtain a loan of money from said bank, or its branches, shall be, and the same is hereby, repealed.

Sec. 14. And be it further enacted, That it shall be the duty of the president and directors of the principal bank and its branches to regulate the calls to be made on notes under discount by the dates of the loans, calling first upon the loans which shall have been first made, in such manner as to afford to each individual, as near as may be, the same indulgence in regard to time, unless it shall appear at any time necessary to a majority of the board to adopt a different course, for safety and security of any particular debt or debts which may be due.

Sec. 15. Be it further enacted, That no bill of exchange or note shall be discounted or purchased in the said bank, or either of its branches, whereby to obtain therefrom a greater loan or accommodation than the person or persons offering the same might obtain, agreeably to law, in ordinary transactions upon notes of accommodation, unless the person or persons offering the same shall file therewith his, her or their affidavit, with the president, cashier or clerk of the bank or branch in which the application shall be made, that he, she or they either have, or verily believe will have, funds to meet and discharge the said bill or note, at the time and place, agreeably to the tenor and import thereof, or that he, she or they intend and expect to apply the money or accommodation desired in the purchase of the products or stock of the county, for the exportation thereof: and either of the said officers of the bank or branch in which the application shall be made, or any justice of the peace, may administer the said oath; and the affidavit, when made, shall be lodged with, and safely kept by, the cashier or clerk thereof, until duly called on for the same, by some officer of the government, for the purpose of administering the laws.

Sec. 16. Be it further enacted, That the said corporation may issue notes of a less denomination than one dollar, and the board of directors of the principal bank may, if they deem it expedient, authorize the issue of notes of a less denomination than one dollar, at the branches, to be signed by the president, and countersigned by the cashier of the branch issuing them; provided, that the amount authorized to be issued by the branches, in small change, shall be deducted from the principal furnished the said branches, respectively.

Sec. 17. Be it further enacted, That it shall be lawful for the president and directors, for the time being, of the parent or principal bank aforesaid, if they shall deem it necessary for the more convenient and speedy operation of said corporation, to appoint, from time

to time, some officer of the said bank, or other suitable person, to sign, under their direction and superintendence, any notes that may be issued by the order of said corporation of the denomination of one dollar, and of all such smaller denominations as it may at any time be lawful for said corporation to issue; and all such notes signed by the person appointed as aforesaid, and issued by said corporation, at the principal bank, or any of its branches, shall have the same force and effect, and be in all respects upon the same footing as if signed by the president of said corporation, and countersigned by the cashier of the parent or principal bank."

Bill of exceptions cont'd.

"Also an act entitled an act to attach the county of Nicholas to the first district of the Bank of the Commonwealth of Kentucky," ("here insert it,") ("manuscript act,") and the same is as follows, to wit:

Manuscript act of Ky. Legislature.

"An act to attach the county of Nicholas to the first district of the Bank of the Commonwealth of Kentucky.

Sec. 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that the county of Nicholas shall hereafter be attached to and compose a part of the first district of the Bank of the Commonwealth of Kentucky.

Sec. 2. It shall be the duty of the cashier of the branch bank at Falmouth to certify and send to the president and directors of the branch bank at Flemingsburg, the notes under discount for the citizens of Nicholas county, in said branch, at Falmouth, when this act shall take effect; and thereafter, all said notes may be received in the branch bank at Flemingsburg, in the same manner as if the original loan or loans had been made there, and the same lien shall attach in favor of the branch bank at Flemingsburg upon any real estate which may have been mortgaged to the branch bank at Falmouth, as if said mortgage had been given to the branch at Flemingsburg, and the like proceedings had, in case of default; and the branch bank at Falmouth shall, hereafter, cease to renew or discount notes for the citizens of Nicholas county.

Sec. 3. The cashier of the branch bank at Falmouth shall, upon the production of the checks from the cashier of the branch bank at Flemingsburg, for the amount of notes discounted in the branch bank at Falmouth, and which may have been renewed in the branch bank at Flemingsburg, under this act, cancel such notes by carrying to the credit of notes discounted the amounts thereof, and charging the same in an account current to the branch bank at Flemingsburg.

Sec. 4. That the branch bank for said first district shall, hereafter, be entitled to, and have one additional director from the county of Nicholas.

Sec. 5. This act shall take effect from and after the first day of January, and all laws contravening the provisions of this act shall be repealed.

Approved January 3d, 1825.

STATE OF KENTUCKY,
Office of Secretary of State, Frankfort, Sct.

I, Lewis Sanders, ju'r., Secretary of the State aforesaid, do hereby certify that the annexed book, entitled "Acts passed at the first session of the twenty-ninth general assembly for the Commonwealth of Kentucky, begun and held in the town of Frankfort, on Monday, the sixteenth day of October, 1820, and of the Commonwealth the twenty-ninth; and particularly an act entitled, "An act to establish the Bank of the Commonwealth of Kentucky," approved November 29th 1820, contained in said book, commencing at page 55, and concluded on page 65 thereof; also an act entitled "An act supplementary to an act to establish the Bank of the Commonwealth of Kentucky," approved December 22d, 1820, commencing at page 165 in said book, and concluded on page 170 thereof; and also the annexed manuscript copy of an act, entitled "An act to attach the county of Nicholas to the first district of the Bank of the Commonwealth of Kentucky," approved January 3d, 1825, are severally, full, true and complete copys of the acts they purport to be, as fully, truly and amply as the same remains on the original enrollments in my office; and the said book was printed and published by and with the authority of the State aforesaid.

In testimony whereof, I have hereunto set my hand, and caused the seal of the said State to be affixed hereto,
[L. S.] at Frankfort, this twenty-eighth day of November, 1832, and in the 41st year of the Commonwealth.

L. SANDERS, Ju'r, *Secretary of State.*

Bill of Exceptions continued.

"And this was all the testimony in the cause. And thereupon the court, sitting as aforesaid, found all the issues for the plaintiffs, and gave judgment accordingly, and thereupon the defendants filed their motion for a new trial as follows: (here insert it,) see pages 28 and 29 of this record, said motion being there entered, "which motion the court overruled, to which finding by the court of the issues as aforesaid, and the said decision overruling the said motion for a new trial, the said defendants except and pray this, their bill of exceptions, to be signed, sealed, and made a part of the record in this cause, which is done, &c.

DAVID TODD, [SEAL.]

Costs.

The plaintiffs' costs in the above cause, taxed as having accrued at their instance, and for which the defendants are bound, amounts, as per bill filed with the papers, to the sum of $15 32¼

Costs which accrued at the instance of the defendants, and which have been paid by them, amounts, as per bill thereof, taxed and filed as aforesaid, to the sum of 2 08¾

Total costs in the cause, $17 41¼

On the 18th day of February, A. D. 1835, an execution issued upon the judgment rendered in this cause, in favor of the plaintiffs, against the defendants aforesaid, directed to the sheriff of St. Charles county, for the sum of five hundred and fifty dollars debt, two hundred and forty-one dollars and fifty-four cents damages, and fifteen dollars, thirty-two and a half cents costs, returnable on the first Monday of June next, which execution has not yet been returned.

STATE OF MISSOURI, COUNTY OF CALLOWAY, *sct.*

I, Irvine O. Hockaday, clerk of the circuit court within and for the county aforesaid, do certify that the foregoing sixty pages contains a true, perfect, and complete transcript of the record and proceedings in the case therein named, of the President and Directors of the Bank of the Commonwealth of Kentucky, plaintiffs, against Thomas Griffith, Thomas W. Collier, and Elisha McClelland, defendants, upon petition and summons as fully and amply as the same now remains in my office, which transcript is made out in obedience to the command of the writ of error issued by the clerk of the Supreme Court of the first judicial district of Missouri, which is hereto attached.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at office, this 21st day of April, [L. S.] A. D. 1835, and in the 15th year of the State.

IRVINE O. HOCKADAY, *Clerk.*

Writ of Error.

STATE OF MISSOURI, *First Judicial District, sct.*

THE STATE OF MISSOURI,

To the Judge of the Circuit Court, for the County of Calloway, greeting:

Whereas it hath been suggested to us that in the record and proceedings, and also in the rendition of the judgment in a certain cause lately pending before you, wherein the President and Directors of the Bank of the Commonwealth of Kentucky *was* plaintiffs, and Thomas Griffith, Thomas W. Collier, and Elisha McClelland were defendants, manifest error hath occurred, and we being willing that such errors, if any there be, should be corrected, do command you that the record and proceedings of the said cause you send, certified as fully and amply as the same now remains before you, to our Supreme Court of said State, to be held at the town of Fayette, in the county of Howard, within and for the first judicial district, on the first Monday after the fourth Monday of April instant, so that our judges of our said Supreme Court, on inspecting the same, may proceed to do therein

that which to law doth appertain, and to them seem meet and proper. And have you then and there this writ.

[L. S.] Witness Gray Bynum, clerk of our said Supreme Court, at office, this 18th day of April, A. D. 1835.

GRAY BYNUM, *Clerk.*

STATE OF MISSOURI, COUNTY OF CALLOWAY, *sct.*

In obedience to the command of the within writ of error, I herewith forward to the Supreme Court of the first judicial district of Missouri, a true and perfect transcript of the record and proceedings in the case therein named, of the President and Directors of the Bank of the Commonwealth of Kentucky, plaintiffs, against Thomas Griffith, Thomas W. Collier, and Elisha McClelland, defendants, upon petition and summons, as fully and amply as the same now remains in my office, this 21st day of April, A. D. 1835.

IRVINE O. HOCKADAY,
Clerk of the Calloway Circuit Court in the first Judicial Circuit, Missouri.

And afterwards, to wit, at a Supreme Court opened, begun, and held at the town of Fayette, in the county of Howard, in and for the first judicial district in said State of Missouri, on the fifth day of May, in the year of our Lord, one thousand eight hundred and thirty-five, the following proceedings were had, to wit:

THOMAS GRIFFITH, THOMAS W. COLLIER, AND ELISHA MCCLELLAND, *vs.* THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.	In Error.

The plaintiffs, by their attorney, file their assignment of errors, which assignment of errors aforesaid reads as follows, to wit:

Assignment of Errors.

"And now at this day comes the said plaintiffs in error, by their attornies, and say, that in the record and proceeding in the above cause, and in giving the judgment therein, there is manifest error in this, to wit, that by the record aforesaid, it appears that the special demurrer, filed by the plaintiff in error in the circuit court, was overruled, whereas, by the laws of the land, it should have been sustained. There is also error in this, that by the record aforesaid it appears that judgment was given for the defendants in error, whereas, by the laws of the land, the judgment aforesaid ought to have been given for the said Thomas Griffith, Thomas W. Collier, and Elisha McClelland. There is also manifest error in this, that the motion of said plain-

tiffs in error, made in the circuit court to set aside the said judgment, was overruled, whereas, by the laws of the land, said motion ought to have been sustained.

Wherefore, for the errors aforesaid, and for divers other errors in the record and proceedings aforesaid, and in the judgment, the said plaintiffs in error pray that said judgment may be reversed and held for nought, and that they may in all things be restored to what they have lost thereby.

S. KIRTLEY,
Attorney for Plaintiffs in Error.

And afterwards, to wit, at the same court, to wit, the Supreme Court of the *the* said State of Missouri, in and for the first judicial district begun and at the same place, to wit, at the town of Fayette, in the county of Howard, on the seventh day of May last aforesaid, in the year aforesaid, to wit, in the year of our Lord eighteen hundred and thirty-five, the following entry was made on the record of said court, to wit:

Continuance.

"By agreement of the parties, by their attornies, this cause is continued until the next term of this court."

And afterwards, at a Supreme Court opened, begun, and held at the town of Fayette, in the county of Howard, within and for the first judicial district in said State, on the second day of September, in the year last aforesaid, to wit, in the year of our Lord eighteen hundred and thirty-five, the following entry was made on the record of said court, in the said cause, to wit:

"Now at this day came the parties aforesaid, by their respective attornies aforesaid, whereupon all and singular the premises being by them before the court now here fully argued, and the court not being yet advised what judgment to give on the premises, take time to deliberate thereon."

And afterwards, to wit, at the same town and at the same court, on the third day of the month last aforesaid, to wit, the month of September, in the year last aforesaid, to wit, in the year eighteen hundred and thirty-five, the following was made in the said cause, to wit: "This cause is ordered to be continued until the next term of this court for re-argument.

And afterwards, to wit, at a Supreme Court opened, begun, and held, at the town of Fayette, in the county of Howard, within and for the first judicial district, in said State of Missouri, on the sixth day of May, in the year of our Lord eighteen hundred and thirty-six, the following entry was made in the record of said court in the said cause, to wit:

"Now at this day come the said defendant, by her attorney, whereupon all and singular the premises are, by the said defendant, before the court now here fully argued, and the court not being yet advised what judgment to give in the premises, take time to deliberate thereon."

And afterwards, to wit, at the same term of the court aforesaid, and on the ninth day of May, in the year last aforesaid, to wit, in the year eighteen hundred and thirty-six, the following judgment was rendered by said court, in the above cause, to wit:

Judgment.

"Now, at this day, come the parties aforesaid, by their respective attorneys aforesaid, whereupon as well the record and proceedings aforesaid, and the judgment thereupon given, as the matters aforesaid by the said plaintiffs above, for error assigned, being seen, and by the court here fully understood, and mature deliberation thereupon had; for it appears to the court here, that in the record and proceedings aforesaid, and also in the giving the judgment aforesaid, it *is* manifestly erred. Therefore it is considered by the court here, the judgment aforesaid for the errors aforesaid, and others in the record and proceedings aforesaid, be reversed, annulled, and entirely for nothing esteemed.

And it is further considered by the court that the said Thomas Griffith, Thomas W. Collier and Elisha McClelland, recover against the President and Directors of the Bank of the Commonwealth of Kentucky their costs and charges, by them about the prosecution of their writ of error in this behalf laid out and expended, and that they have thereof execution.

And on the same day and year last aforesaid, the court delivered the following opinion, to wit:

Opinion of Court.

"Statement of the case and opinion of the court by Tompkins:

THOMAS GRIFFITH, THOMAS W. COLLIER, AND ELISHA MCCLELLAND *vs.* THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.	Error to the circuit court of Calloway county.

Statement.

The President and Directors of the Bank brought their action against the defendants.

The defendants pleaded several pleas; that which alone is material to be noticed here is, that the note sued on was made by the defendants to the plaintiffs, in consideration of paper of said Bank of the Commonwealth of Kentucky, and that the said paper was bills of credit, within the meaning of the Constitution of the United States, issued on the credit of the State. The replication to this plea denies

that the said bank paper, or the notes of said bank, were issued on the credit of the State, or that they are bills of credit. The charter of the bank was read in evidence.

Opinion.

The same question arises in this case that did in the case of the Bank of the Commonwealth of Ky. vs. David Clark, decided by this court at its April term, in the second district, in the year 1835. There the charter of the bank was set out in the plea—here it was read in evidence to support the issue made up, and is preserved in the bill of exceptions. The court being satisfied with the opinion given on the former occasion, will do nothing more than refer to it. It may be found on the 59th page of the first semi-annual part of the 4th vol. of Missouri Dicisions. The judgment of the circuit court, for the reasons given in the opinion delivered in that case, is reversed.

M. McGIRK,
G. TOMPKINS,
R. WASH.

STATE OF MISSOURI, *County of Cooper, ss.*

I, Robert P. Clark, clerk of the supreme court of the State of Missouri aforesaid, within and for the first judicial district, do hereby certify that the foregoing contains a full, true and perfect transcript of the record and proceedings in the cause of Thomas Griffith, Thomas W. Collier, and Elisha McClelland, against the President and Directors of the Bank of the Commonwealth of Kentucky, as will in the circuit court as in the supreme court, as fully and amply as the same now remains in my office.

In testimony whereof, I, Robert P. Clark, of our said supreme court, in and for the district aforesaid, have hereunto [SEAL.] set my hand and seal of said court, at office, this twentieth day of January, in the year of our Lord eighteen hundred and thirty-nine.

ROBERT P. CLARK, *Clerk.*
By B. C. CLARK, *D. C.*

395.

SUPREME COURT OF THE UNITED STATES.

No. 36.

WILLIAM A. CARR, APPELLANT,

vs.

SAMUEL H. DUVAL & AL.

ON APPEAL FROM THE COURT OF APPEALS FOR THE TERRITORY OF FLORIDA.

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pressed the desire that said Stephen should have nothing to do with him.

The said defendants, further answering, say, that they do not admit the truth of the *various* and *several* comments, statements of thoughts, motives, inducements and considerations which influenced the determination of the complainant, as detailed in the said bill; nor do they admit the truth of the alledged excuse set up in said bill by said complainant, that he was absent from home when respondent Stephen W. Harris' letter of the 16th Jan'y last was received, as these respondents do not know the same to be true.

The said defendents, Mary D. Harris, Peter C. Harris, Albert J. Pickett and wife, Joseph W. Field and wife, and Mary, answering by her next friend and guardian, protesting that they have not been in any wise affected by the acts of said Stephen Harris, nor in any manner concluded thereby, never having given him any authority to dispose of their interest in said lands, still insist, with him, that the conclusion of the letter from the said Stephen to the complainant, attached to said bill, as exhibit (E,) of date of the 16th Jan'y last, prescribes the terms and conditions on which the offer of the complainant was accepted, and that it was not competent for the complainant to alter or add to, or in any wise to depart from those terms. The said letter states, among other things, "the last payment is to be made in cash, and, as all the heirs live in the neighbourhood of this place, it will be the only place where we can conveniently meet to close the bargain. I wish to know your decision by return mail, as I have three other offers for the land, and can sell it immediately, if you do not wish to take it."

The said defendants say, that instead of making answer to the said letter by return of mail, *that* the answer was not written until ten days after the same ought to have been received at Athens, in Georgia; that, by the regular course of mail, the said letters must have reached Athens, in Georgia, by the twenty-second of January, and if the request of the said Stephen had been complied with, that the reply would have reached Montgomery before the date of the reply; that if complainant was absent from home, it was his misfortune; that complainant has not mentioned in his bill the day that said Stephen's letter was received, and that the omission to state a fact so material is calculated to raise a presumption that the said complainant did not answer it immediately upon its receipt.

They, further answering, shew, that time was of the essense of the overture. That it was stated in said letter that other bidders were ready to buy the land, and that it could be, and as the intention is given, would be, sold if not taken by the complainant. The said defendents insist that this omission, proceeding from what cause it does not matter, relieved the defendant, Stephen, from all obligation to the complainant, and authorized him to sell the land to others.

The defendents, further answering, say, that the complainant did not accede to the other condition prescribed in said letter; that the

complainant states in his letter "that it is out of his power to go to Montgomery; that you (Stephen Harris) will have to get all the parties interested in the land together, which I suppose you can easily do, as you say they all live in the neighbourhood, and have the titles perfected to me, and in doing so, the title must be conjointly by all the heirs interested in the land made and executed; and those who have families, their wives must assign over and relinquish their right of dower to the same, and when it is, that is, the title, properly executed, one of you can convey it or send it to me, or some agent at Tallahassee, and receive the first payment for the same, and my notes for the balance of the purchase money, and the mortgage on the land, which suits me better than personal security."

And said defendents insist, that the said Carr, if he wished to purchase the land of these defendants, he must do so on their, and not his, terms; that it is sufficient for them to say, that this arrangement did not suit their convenience; that they, nor neither of them, had any particular wish to visit Florida on that business solely, and expose their persons to the dangers of the Indian war, or their property being converted into notes of banks that are without credit in the neighbourhood in which they live; and if all these things were different, they have the right to say to the complainant, it is their humour that he should visit Montgomery to perfect the arrangements, and that he cannot deprive them of their property unless the same is gratified.

The said defendents further say, that said letter is dictatorial, and imperious in other respects, particularly in that in which he states that "I shall require the boundaries of the land to be defined, so that I may know where the land lies, and when I am on my own land, as well as avoid getting on my neighbour's land," thereby holding out that new surveys were to be made, and new scruples were to be satisfied.

These defendents pray, that said letter be considered as part of the evidence in this case, and that they have leave to refer to the same as often as their case requires.

The said defendent, Stephen, further saith, that said complainant was advised of the state of the title, and that difficulties might occur in the comple ›n of any title, by the refusal of the other defendents; that all his orrespondence indicates that he did not consider the contract as consummated until all these requisites had been complied with, to wit: titles made satisfactory to himself, surveys or other modes of ascertaining boundaries had been executed, lands identified according to his views of propriety, payments to be made at the point that would suit his convenience, and that the defendent, Stephen, had the right, at this stage of the negociation, to reject his propositions, and refuse compliance with his requisitions; that his last letter contains a distinct abandonment of his first overture, in as much as he submitted an unconditional proposition to pay twenty thousand dollars for the lands, and his last letter encumbered the proposition with inconvenient and vexatious conditions.

Respondents, further answering, say, that on the 11th March last, *that* they sold the land to Samuel H. Duval; that they gave a title bond to said Duval, which is supposed to be in his possession; that they felt no obligation to the complainant, and that none of the defendents but Stephen had ever corresponded with, or authorized correspondence with him, except Albert J. Pickett, in form aforesaid; that said Stephen considered the negotiation at an end, or if not at an end, as entirely undetermined by the interposition of new conditions by the complainant.

Said defendants say, that their contract with Duval was open and fair; that he was not advised by them of Carr's correspondence; that he was informed that a correspondence had taken place between Stephen and Carr by said Peter C., and was subsequently informed that that correspondence imposed no obligation upon them; that most of the parties to the contract were ignorent of the tenor of that correspondence, and considered that they were perfectly free to sell their property, as none but Stephen was a party to that correspondence.

The defendents say, that after the sale to Duval was complete, and their obligation to him perfect as it now is, *that* the complainant came to Montgomery, in Alabama, and demanded titles for the said lands.

Said Stephen says, from his own knowledge, and the others upon information derived from him, and belief of the truth thereof, that said complainant offered to pay the same that said Duval did for the land, to indemnify against the contract with him, but that his offers were rejected; that complainant spoke of his trouble, expense and inconvenience, and that he had sold a part of the land to Duval, relying on the correspondence with Stephen W. Harris, in relation to the transaction; that he had the first instalment in hand ready to pay, and title papers ready to be executed, which was addressed to Stephen alone, in the absence of the others; that said Stephen did not read the papers, nor did he see the money, nor does he know the form of the papers or the contents. The said Stephen admits that he refused to permit the said complainant to read his letters; the said complainant threatens so much that said defendent was not disposed to yield to him any demand that he made, supposing that he might have some sinister design; that the land was previously sold to Duval, and Carr knew it.

These defendents deny, that the title papers were not signed till the 2d of April, 1836. They say that the papers were drawn and executed on the 11th or 12th March, 1836, and that no other title paper but the bond was ever executed by them. As to the allegations in relation to the notice to Duval from Carr, these defendents know nothing; as to the allegations of Shepard's interest, these defendents know nothing, and have no information except from Samuel H. Duval, and from complainant's bill, which, in relation to the notice at Wycoff's plantation, directly contradictory; and their belief is, that no such notice was given, S. H. Duval denying it; that the

bargain was made with Duval *only*, defendents having heard that said Carr has illegally taken possession of said lands, but of their own knowledge know nothing.

The said defendent Stephen, in conclusion, says, that the said Carr did not comply with the conditions prescribed by him; that he raised difficulties about the boundaries; that he was fearful that difficulties might be made in relation to a conveyance to Carr in respect to the title; the said Carr never answered his letter as he directed; that he never considered the contract as definitely settled, and that he considered himself at liberty to put an end to it.

The other defendents deny the rights of Stephen W. Harris to sell said lands except so far as he was interested in them. They say they gave him no authority to do so, and *was* not advised of his actions in that regard.

They further say, that the money was not paid by said Duval until the 2d of April, but that on the 11th or 12th of March, 1836, he gave his note for the amount thereof, due in twenty days from date.

These defendents, further answering, say, that they gave no authority to their agent to demand a cancellation of the control [contract;] that his powers even limited to a receipt of the money on the note, and that his act would not have been ratified if Duval had have accepted of his proposition to cancel. They deny that they ever agreed to conclude such a pretended contract, and they repel the imputation that their cupidity was awakened by the greater offer of Duval to violate their promise; the defendents are not so pressed for the small sum that constituted the difference between the two offers to do what is not legal or proper; the said Peter C. Harris says he did not wish Carr to have said land; that he did not think that he would honestly fulfil*l* any contract that he could make, and that he disswaded his brother from all intercourse with him; that Duval's offer was satisfactory. The conversation was principally had between Peter C. Harris and Duval, who had been acquainted in Florida. Interest was demanded and agreed to be paid after a very little time. The said Peter C. distinctly stated to said Duval that they were under no obligation to any one to prevent the sale of the land to him, and that title bond, as aforesaid, was executed by all the defendents except Field and wife, and Joseph Phitzpatrick signed the same as security. Said bond is not in their possession or within their reach, but they believe that it obliges them to make a full and complete title; the obligors aforesaid undertaking for Mary and for Fields, who was out of the State.

The defendants aforesaid deny all fraud, combinations and confederacy, as alle*d*ged in the bill of complainant, and as to all the matters and things not herein before confessed, answered or avoided, they admit as true, and having fully answered, pray to be dismissed with their costs.

C. S. SIBLEY,
Solicitor for said def'ts.
DUVAL, ALLEN & WESTCOTT,
Of counsel for said def'ts.

THE STATE OF ALABAMA, *Montgomery County.*

Before me, David Campbell, a justice of the peace in said county, came Stephen W. Harris, Mary D. Harris, and Albert J. Pickett, who being respectively sworn according to law on their oaths, say, that the matters, charges, allegations, and things in their answers annexed, as set forth and stated therein, are true, so far as stated of their own knowledge, and those from information and belief are stated truly according to such information and belief.

S. W. HARRIS,
MARY D. HARRIS,
MARY G. HARRIS,
By Mary D. Harris,
ALBERT J. PICKETT,
SARAH S. PICKETT,
Signed by A. J. Pickett.

Sworn and subscribed before me, this *the* 25th day of April, A. D. 1836. DAVID CAMPBELL, *J. P.* [SEAL.]

STATE OF ALABAMA, *Montgomery County.*

I, James E. Belser, clerk of the county court for the county of Montgomery, do hereby certify that David Campbell, whose attestation is made in the foregoing affidavit, at the date thereof, was and now is an acting justice of the peace, in said county, and that full faith is due to all his acts, and that his attestation is in due form.

In witness whereof, I have hereunto set my hand, and affixed the [SEAL.] seal of said county, this the 25th day of April, A. D. 1836.

JAMES E. BELSER,
Clerk of c'ty court.

STATE OF ALABAMA, *Macon County.*

Before me, Joseph P. Clough, a judge of the county court in said county, came Peter C. Harris, who, being duly sworn according to law, on his oath, says, that the matters, charges, allegations, and things in these answers annexed, as set forth and stated therein, are true, so far *as* stated of his own knowledge, and those from information and belief are stated truly according to such information and belief.

PETER C. HARRIS.

Sworn to and subscribed before me this the 26th April, 1836.
JOSEPH P. CLOUGH, *J. C. M. C.*

THE STATE OF ALABAMA, *Macon County*.

I, Sampson Lanear, clerk of the county court for the county of Macon, do hereby certify that Joseph P. Clough, whose attestation is made in the foregoing affidavit, at the date thereof, was and now is an acting judge of the county court of said county, and that full faith is due to all his acts, and that his attestation is in due form.

Given under my hand and private seal, having no seal office, this 26th Ap'l, 1836.

SAMPSON LANIER, *Cl'k*.

[A.]

ATHENS, Dec. 25th, 1835.

MR. STEPHEN W. HARRIS:

DEAR SIR: Yours of the 15th instant came duly to hand by due course of mail, and I hasten to answer it, although I am sorry to say we cannot trade, for the requisition in your letter of interest on the last payment will prevent. I was willing to give you the sum I offered, and the payments, to wit: the twenty thousand dollars in three payments, one-third down, and the remainder in two equal annual instalments, without interest; this I did consider, and even flatter myself that you must think so too, a very liberal offer for so large a body of land all in woods; it is a large sum of money to pay for land and lye out of the use of it 4 years before I could realize any thing from the land by cultivation; for any man who goes into the woods, and commences a plantation on the hammock lands in Florida, must be that long, or longer, before he can realise any thing from them, and it would be better for a man to pay 25 or even 50 per cent. higher for lands of a similar quality with a plantation ready cleared on it, for he can't make the money of it before he could git the plantation cleared on such land as yours. Now I am willing to exchange my lands here, and give you some difference; as I wrote you before a discription of my land, here it will be needless to repeat it. I then hold my lands here at $20,000; I will now exchange them for the whole tract of the Florida land belonging to yourself and brothers, and give you $3,000 to boot; or I will still make you the same offer I did before, beyond which I cannot go, for I can get lands of Gen'l Call, on the opposite side of the lake, with some cleared land, a plantation on it, at the same price you hold at. Please communicate to me immediately your final determination as soon as you receive this, as I expect to leave home in January, and will be absent, if I do, for some time.

Very respectfully remain yours,

WILLIAM A. CARR.

N. B. Direct to Athens, as before.

[B.]

MACON, February 19th, 1836.

MR. STEPHEN W. HARRIS:

DEAR SIR: You will perceive, by the date of my letter, I am thus far on my way to Florida, where, if no accident prevents, I shall reach *there* in the course of 5 days more, where I hope to see you and have our business brought to completion, where I can pay you the first payment, most of which I have had for some time, and take a title to the land. I have been delayed starting as early as contemplated from circumstances entirely beyond my control, but soon, now, I hope I shall be able to comply, on my part, and hope, ere this, you have received my last letter, and had the title completed according to directions, viz: to have all the heirs interested in the land to join you in the title, and those who have wives, to have them, their wives, to assign over and relinquish dower to the same, and you can start for Tallahassee as soon as you please.

Respectfully remain your friend,
WILLIAM A. CARR.

[C.]

ATHENS, Feb'y 3d, 1836.

MR. STEPHEN W. HARRIS:

D'R SIR: Yours of the 16th Jan. I received upon my return from Augusta, and, according to your request, hasten to answer it, and, for answer, say, that I am still as desirous as ever of taking the land, and have considered myself bound to you for the money, and you as equally bound to me for the titles to the land; but as there was in my mind at least some doubt to which of my propositions you had acceded, I thought it best to write again, and be definitely informed on that subject, for the reasons stated in my last. It will be out of my power to go to Montgomery, as my family is sick: my wife, who has been confined, took cold, by leaving her room too soon after her confinement, and upon my arrival at home found her quite sick: although better, is still too unwell for me to leave home just at this time, and our court commencing here next week, I shall have to remain until that is over: then I am compelled, if my wife's health permits, to go immediately to Florida, as you have no doubt heard of the distressing situation of the country there in consequence of the Indian hostilities; so you will have to get all the parties interested in the land together, which I suppose you can easily do, as you say they all live in the neighbourhood, and have the titles perfected to me;

and in doing so, the titles must be conjointly by all the heirs interested in the land, made and executed; and those who have families, their wives must assign over and relinquish their right of dower to the same; and when it is, that is, the title, properly executed, one of you can carry it or send it to me, or some agent at Tallahassee, and receive the first payment for the same, and my notes for the balance of the purchase money, and the mortgage on the land, which suits me better than personal security; and in order that the business may be more properly executed, yourself and Judge Field had better be in Florida, for I shall require the boundaries of the land to be defined, so that I may know where the land lies, and when I am on my own land, as well as avoid getting on any of my neighbour's land. Will you be pleased to state what are the offers made you, and by whom, as you say in your last letter you "have three other offers for the land;" be good enough to state explicitly by whom they are made, what is the amount of each offer, and the payments. I ask this as it cannot now make any difference to you, as I consider this matter closed between us; in other words, I consider the trade as made between us, which puts the land entirely out of the market. Any further communication between us will have to be sent to me to Tallahassee, Florida, as the mail communication between this and Montgomery is so uncertain that an answer would not reach here until I should be gone to Florida. If you would prefer to remain at home until you know certainly when I would be in Florida, I will write, on my arrival there, to you, and inform you when to meet me or go on there; the latter plan will perhaps be more desirable to you. I must here inquire if any part of this tract has been taken off or sold to any person, as I have understood by some it contained 2,300, and by others 2,400 acres; but you always told me in our correspondence you would not divide it. Shall I hear from you at Tallahassee, as an answer would reach me there by the time I reach there?

Respectfully remain yours,
WILLIAM A. CARR.

[D.]

TALLAHASSEE, *March 5th*, 1836.

MR. STEPHEN W. HARRIS:

DEAR SIR: I have not received any information from you since I left Athens, although I wrote you from there, Athens, and informed you of the time I should be here, as well as from Macon, on my way here, two weeks ago to-day, and there informed you I should be here, in the course of 4 or 5 days from that time, and was ready to pay the first instalment for the land I purchased of you, according to our agreement, as soon as I could get a title to the same: then I wrote you a week ago, or more, from this place, and gave you the same information, that is, that I was ready to pay the first instalment, and

requested you should come in, or send some person to receive the money and execute a title to the land. Indeed I stated to you that the money had been ready, the largest portion of it some time, as I also stated from Athens, before I left, that upon your meeting me here, and making me a title, I would be ready to pay the first instal ment of the one-third in cash, all of which I have not as yet received any answer to, and am still waiting your order to know what disposition to make of the money, and I am anxious to go on with the improvement of the land, as I expect to build on it, and it is all important that I should have the title as quick as possible, for which purpose I am, and have been waiting on you for some time; will you be so good as to inform me when you will come on with, or send the title, and receive the money, as I shall expect you to comply very shortly on your part with our contract, so as to enable me to perform, on my part, as I am ready and still waiting to pay over the money. Your early attention to this subject will prevent much difficulty and trouble.

Respectfully remain yours,
WILLIAM A. CARR.

[E.]

TALLAHASSEE, *Feb. 27th*, 1836.

MR. STEPHEN W. HARRIS:

DEAR SIR: According to promise, when I wrote you last at Athens, I write you on my arrival at this place, although I wrote you from Macon, on my way here, and stated I should be here in a few days, and then observed I would be ready to comply on my part with our contract in the purchase of the tract of land I bargained with you for, and I now am here, ready with the money to make the first payment of the one-third in cash, and receive a title to the same, and execute my notes for the other two-thirds, at one and two years, and give a mortgage on the land to secure the payment of those notes for the two latter payments, according to our contract. Indeed, I expected to have found you or some person delegated with the power here, to have received the money, and delivered the title; but not doing so, I address this communication to you, to inform you I wish you to come or send the title complete, according to my former letters on that subject, and receive the money for the same immediately, and let the business be finished, as I do not know how long I may remain here, and I want to have it completed before I leave. Will you be pleased to write me immediately, and let me know what I shall do with the money, as I do not wish to keep that sum, so large a one, by or about me.

Respectfully remain your friend,
WILLIAM A. CARR.

The joint and several answers of Samuel H. Duval and John S. Shepard, to the bill of complaint of William A. Carr, exhibited against them and others, in the superior court of the middle district of Florida, for Leon county.

These respondents, saving and reserving to themselves now and at all times hereafter, all, and all manner of advantage of exception to the many errors, defects, imperfections, uncertainties, and untruths in the complainant's bill of complaint contained, and insisting according to the statute of the Territory of Florida, entitled "*An act to regulate proceedings in chancery,*" approved November 9th, 1828, upon their right to except to said bill; and that the same should be dismissed for want of equity, therein shown; and insisting also on the several special matters in this answer set forth, and that they shall have the same benefit thereof, under the said statute, as if they had pleaded the same matter, or had demurred to the said bill, answering to the best of their respective knowledge, information and belief, say, that with respect to many of the allegations in said bill of complaint these respondents have no direct personal knowledge, and cannot answer, except from hearsay and report; and as to most of said allegations, these respondents, for answer, say that they have carefully read the answer of Stephen W. Harris, Mary D. Harris, Peter C. Harris, Albert J. Pickett, and Sarah, his wife, and Mary G. Harris, to said bill filed simultaneously herewith, and prefixed hereto, and which answer respondent, Duval, says was signed, verified, and sworn to in his presence, by the defendants, answering therein, in the manner and form, and before the officers, as certified at the conclusion of said answer.

And these respondents, further answering, say that the several matters and things in the said answer contained, and each and every of them, were and are, according to the best of their knowledge, information and belief, true and correct in every respect, as therein stated and set forth.

And these respondents respectively answer said bill, and the allegations thereof, in the same manner and form, and to the same effect, intent and substance, as the same are answered in the foregoing answer, and not differently or otherwise, except as hereinafter particularly stated; and they invoke and refer to the said answer and exhibits, and insist that the same be taken and considered as a part of this their answer to said bill, and that the several matters and things therein and thereby answered, set forth and insisted upon, shall be taken and considered as being contained and incorporated, answered, set forth and insisted upon, herein, the same as if herein fully repeated at large. And as to the other allegations in said bill, and which these defendants, or either of them, answer differently, otherwise, or more fully, than is answered in said answer, these respondents say, that, prior to and about the time of the sale of Wykoff's property, being about the first of March, 1836, these respondents both heard various loose, flying rumors that complainant was endeavouring to purchase said land, and of his having had a correspond-

ence on the subject with some of the owners in Alabama, and that complainant had reported that he had made some arrangement with them; that respondent Shepard would not hold intercourse or association with said Carr, and knew nothing, therefore, except what he heard from third persons: that respondent Duval had, at Wykoff's sale aforesaid, some loose, casual conversation with said Carr, about the land, and likewise in Tallahassee, a few days subsequently; but he denies that he offered to purchase said land of said Carr, and says his conversation was confined to inquiries as to the character of his alledged purchase, in order to ascertain whether said Carr had any legal or equitable claim to said land, as purchaser, and that said Carr did not communicate to him, and in fact concealed from him, the true state of facts with regard thereto; that, subsequently, these respondents made enquiry, and became satisfied said Carr's assertion, that he had purchased said land, was false and untrue, and that no final binding or definite agreement or bargain had been made; and, respondents placing no credit in his word or declaration in regard thereto, and said respondent Duval, conceiving he was not restricted from so doing by any rule of law, equity, morality or courtesy, went, about the 10th of March, 1836, to Alabama, with a view to see the owners of said land, and to purchase the same; that said respondent Duval, being acquainted with said Peter C. Harris, called on him, and enquired of him in regard to said land; that said Peter informed him that, although there had been a correspondence with Carr respecting said land, and proposals by others, the owners were in no wise bound, either in law or equity, to sell said land to him, or any one else; and, thereupon, said respondent Duval made a contract for the purchase of said land, *on the day said contract bears date, of which* a copy is hereto annexed, marked exhibit A, to which respondents refer as a part of their answer: that, prior to said contract being made and executed, this respondent Duval did not see said letters of said Carr, nor, till since the filing of the said bill, was he informed of said alledged deeds or agreements mentioned in said bill and answer: that, two or three days after said contract was executed, said Carr came to Alabama, and insisted he wanted the land, and tried to induce the former owners to break their contract with respondent, by various underhanded means and measures, which, however, they refused to do: that, in conformity with his contract, said Duval paid off his note for $7,105, on the 2d of April, 1836, as will appear by the receipt and cancelled note annexed hereto, and marked exhibit B and C: that respondent Shepard has agreed to take (in pursuance of an understanding existing between them before said contract) part of said land, which respondents insist is none of complainant's concern, and that they cannot be compelled to answer respecting the same any further, or more particularly.

And these respondents, further answering, say, that said Carr has, in defiance of right and justice, and contemning and violating the laws of this territory, tortiously, illegally and wrongfully entered and

trespassed upon and taken possession of the said lands, and tortiously, illegally and wrongfully withholds and detains the possession from him, the said Duval, who is in law and equity entitled to the same, under and by virtue of his said contract: and respondents admit the said Carr provided to be served on said respondent Duval the notice which is hereto annexed, marked exhibit D, dated 23d March, 1836, of his having taken possession of said lands; but they both expressly deny any information, derived in any way or manner, of said Carr being, or claiming to be, in possession of said lands, or any part thereof, till after the purchase of said Duval, and till he had returned from Alabama to Tallahassee: and they now deny that the said Carr had any other possession, at any time, than the wrongful possession above mentioned.

And these respondents, further answering, expressly admit that the said Duval will not only be proceeding to obtain possession of said lands from said Carr, but that he has already, to wit, on the fourteenth day of April, 1836, caused a notice to be served on said Carr, and, May 2d, 1836, on ——— Whitehurst, his agent, of which a copy is annexed hereto, marked exhibit E, and has also instituted legal proceedings, under the statute of this territory, entitled "*An act concerning forcible entry and detainer*," approved Nov'r 10th, 1828, against said Carr and Whitehurst, for the tortious, forcible and wrongful entry and detainer of said lands, as aforesaid, and to obtain restitution thereof, and delivery of the possession thereof to said respondent Duval; which proceedings are now pending, undetermined, before , Esq., a justice of the peace of said county of Leon, and a copy of which is hereto annexed and certified, and to which respondents refer, and pray that the same be taken and considered as a part of this answer; and respondents insist that, before said bill should be heard, entertained or considered, said Carr should confess said suit, and release all errors at law therein, and admit judgment to be entered for said Duval, on his complaint aforesaid therein, and should also be ordered and decreed to deliver up said possession of said lands to the said Duval.

And respondents further insist, that said complainant has no right or claim, in law or equity, in regard to said lands, against these respondents, and that his remedy, if he hath any right or claim of action against any person in the premises, (which respondents deny,) is against said Stephen W. Harris alone, and in and by an action at common law against said Stephen, and not otherwise.

These respondents aforesaid deny all fraud, combination and confederacy, as alledged in the bill of complaint; and, as to all the matters and things not herein before confessed, answered or avoided, they admit as true, and, having fully answered, pray to be dismissed, with their costs, &c.

JAMES D. WESTCOTT, Jr.,
WILLIAM P. DUVAL,
Sol'rs of resp'ts.

LEON, *ss.*

Before me, a justice of the peace of Leon, May 2nd, 1836, personally appeared said Samuel H. Duval and John S. Shepard, and being severally duly sworn, say, on their oaths, that the matters and things set forth in said answer, as of their own knowledge, are true, and that those matters and things stated to be derived from the knowledge and belief, or information of others, they believe to be true, as above stated.

SAMUEL H. DUVAL.
JOHN S. SHEPARD.

Sworn to and subscribed, May 2d, 1836.
R. J. HACKLEY,
Justice of the Peace.

B.

Received, Tallahassee, April 2d, 1836, of Samuel H. Duval, as the authorized agent of Stephen W. Harris, seven thousand one hundred and five dollars, it being the sum due on a note given to Stephen W. Harris for the first payment due on the lands purchased by Sam'l *H.* Duval from Stephen W. Harris.

C. HOOKS.

C.

Twenty days after date I promise to pay to Stephen W. Harris, or bearer, seven thousand one hundred and five dollars, for value rec'd, negotiable and payable at the Union Bank of Florida.

SAMUEL H. DUVAL.

March 11th, 1836.

D.

To SAMUEL H. DUVAL:

Sir, You are hereby notified that I have taken possession of the tract of land lying in Leon county, on lake Jackson, adjoining the lands of John S. Shepard, John Whitehead and others, in said county, and territory of Florida, commonly called the Harris tract of land, under a contract between Stephen W. Harris and myself, under which said contract I purchased the same; you are hereby notified not to molest or interfere with the same under the penalties of the law made and provided in such cases, having understood that you have bargained for the same tract of land, although you were informed I had purchased the same, and having understood that you had bond for titles, you are hereby notified not to transfer or dispose of the same, as I shall require you to produce the original bond given you by Har-

ris for titles, in order that it may be cancelled in terms of the law made and provided in such cases, this 23d March, 1836.

WILLIAM. A. CARR.

Copy. THOMAS ESTON RANDOLPH, *Marshal.*

And at another day, to wit, on the fourth day of July, 1836, the said complainant, by his solicitor, Thomas Baltzell, filed the following amended bill, which was in the words and figures following, viz: Amendment made by consent of parties in the case of William A. Carr, against Harris' heirs, and others, and the said complainant prays, that in the event of the [*costs*] court's not awarding him a specific performance as prayed for in his said bill, that the said Stephen W. Harris may be deemed and adjudged by the court to pay him such damages as he may have sustained by the failure of said Stephen in this behalf, and for such further relief as his case may require.

THOMAS BALTZELL,
Solicitor for Compl't.

June 3d, 1836. Tallahassee.

Agreed to, (subject to exception.)

WESTCOTT, *for Def'ts.*

And at another day, to wit, on the first day of May, 1837, the said complainant, by his solicitor, Thomas Baltzell, filed the following amended bill, which was in the words and figures following, to wit:

To the Honorable the Judge of the Superior Court for the county of Leon, in the territory of Florida.

The amended bill of William A. Carr, to his original bill filed in this honorable court, ag't Stephen W. Harris, Samuel H. Duval, and others, respectfully sheweth to your honor that the said Stephen W. Harris departed this life after the institution of the said suit, on the day of in the State of Alabama, without having made any distribution of his property by last will and testament; that he left, as his hears at law, as far as your orator knows and believes, his mother, Mary D. Harris, his brother, Peter C. Harris, Albert J. Pickett and Sarah, his wife, late Harris, who was sister of said Stephen W., Joseph W. Field and Julia his wife, who was Julia Harris, also sister of said Stephen W., and Mary G. Harris, an infant; that the name of the wife of Stephen W. Harris, and of those other persons who have claims as heirs to the estate of said Stephen W. Harris, they are unknown to him. He therefore prays that they made defendants hereto, and answer all and singular the allegations of this and the original bill herein, as if thereto interrogated—that your orator may obtain suitable relief, as prayed in his said bill ag't said defendants.

THOMAS BALTZELL, *Solicitor for Complainant.*

The joint and separate answer of Albert J. Pickett and his wife Sarah, late Sarah Harris, who is yet an infant, under the age of twenty-one years, who responds by her next friend, guardian and husband, Albert J. Pickett, to the amended bill filed against them and others, in the superior court, in chancery, in Leon county, in the territory of Florida, in addition to the original bill of complaint filed against them and others, of the heirs of Stephen W. Harris, deceased, by William A. Carr.

These respondents, saving and reserving to themselves all just exceptions to the matters and other things contained in the complainant's original and amended bills, for answer thereto, or so much thereof as they are advised is material for them to answer, they answer and saith: That they admit that Stephen W. Harris departed this life on the 16th day of November, one thousand eight hundred and thirty-six, in the county of Montgomery and State of Alabama, intestate and without issue, leaving Elizabeth Harris, his widow, who is now administratrix on his estate: your respondents state that they, together with John H. Gindrat and Mary G., his wife, late Mary G. Harris, who are both infants, under the age of twenty-one years, together with the said Elizabeth Harris, widow of the said Stephen W. Harris, deceased, are the only heirs and legal representatives of the said Stephen W. Harris, deceased, and they do deny that they are in any manner responsible for damages, as claimed by the complainant in his amended bill, for, or on account of his supposed purchase of the lands described in complainant's original bill. Your respondents know nothing of the pretended contracts, as set up by the complainant, except so far as has already been stated in the original answer to the original bill filed by the complainant against Stephen W. Harris, deceased, and call on him for full proof of the bill. The allegations and charges in his said original and amended bills, not admitted by these respondents.

Your respondents rely on the original answer, filed in this suit by Stephen W. Harris and others, and pray the same be considered as a part of this amended answer, as they do verily believe that the said Stephen W. Harris knew more of the facts and transactions with the said complainant, than they or any of the other respondents; and they believe the said Stephen W. Harris has made a fair and true statement of the facts in relation to the pretended purchase of the lands claimed by the said complainant, as set forth in his bill.

Your respondents state that they have no knowledge, except by report, of the transactions, matters, or other things, charged in the complainant's bill, and pray that the answer of Stephen W. Harris, deceased, may be taken and read as their answer to the original and amended bills of the complainant. These respondents having fully answered, pray to be hence dismissed, with their reasonable costs, and will ever pray, &c.

THE STATE OF ALABAMA, *Autanga County*.

Before me, Thomas A. Stewart, an acting justice of the peace, in and for said county, came, Albert J. Pickett, and Sarah, his wife, who being duly sworn, according to law, on their oaths saith: That the matters and things, denials, and allegations, contained in the foregoing answer, herein set forth and stated, so far as stating from their own knowledge, are true, and such facts as are stated from the information of others, contained in their answer, they believe to be true.

A. J. PICKETT.
SARAH S. PICKETT.

Sworn to and subscribed before me, this 25th day of November, one thousand eight hundred and thirty-seven.

THOMAS A. STEWART, *J. P.*

THE STATE OF ALABAMA, *Autanga County*.

I, William N. Thompson, clerk of the county court of Autanga county, do hereby certify, that Thomas A. Stewart, before whom Albert J. Pickett and Sarah, his wife, took and subscribed the foregoing oaths, is, and was at the time thereof, an acting justice of the peace, in and for said county, duly authorized and commissioned, and that full faith and credit are due to his acts as such, and that his said attestation, is in due form.

Given under my hand and seal of office, this the 25th day of November, one thousand eight hundred and thirty-seven.

[SEAL.] WILLIAM N. THOMPSON, *Clerk.*

THE STATE OF ALABAMA, *Autanga County*.

I, Henry Brown, Judge of the county court of said county, do hereby certify that William N. Thompson, at the date of the foregoing certificate, was, and is now, the acting clerk of said county, duly authorized and commissioned, and that full faith and credit is due to all his official acts, and that his said certificate is in due form.

Given under my hand and seal, this 25th day of November, one thousand eight hundred and thirty-seven.

[SEAL.] HENRY BROWN, *J. C. C., A. C.*

And at another day, to wit: on the 13th day of December, 1837, the answer of Elizabeth Harris, the widow of the said Stephen W. Harris, was filed, which is in the words and figures following, to wit:

The separate answer of Elizabeth Harris, the widow and relic of the said Stephen W. Harris, deceased, and who is also the administratrix of the estate of the Said Stephen W. Harris, deceased, to the amended bill filed against her and others, of the heirs of the said

Stephen W. Harris, deceased, in the superior court of Leon county, in chancery, in the Territory of Florida, in addition to the original bill of complaint, filed against her husband, Stephen W. Harris, deceased, and others, by William A. Carr.

Your respondent, saving and reserving to herself all just exceptions to the matters and things contained in the complainant's amended and original bill, for answer thereto, or so much thereof as she is advised it is material for her to answer—she answers and saith:

That she admits that Stephen W. Harris departed this life on the 16th day of November, one thousand eight hundred and thirty-six, in the county of Montgomery, and State of Alabama, intestate, and without issue, leaving her, the said Elizabeth Harris, his widow, and who is now administratrix on his estate.

Your respondent states that she, together with Albert J. Pickett, and Sarah, his wife, late Sarah Harris, who is yet an infant, under twenty-one years of age, and who responds by her next friend and guardian, and husband, Albert J. Pickett, and together with John H. Gindrat, and Mary G., his wife, late Mary G. Harris, who are both infants, under the age of twenty-one: is the only heir and legal representative of the said Stephen W. Harris, deceased, and she does deny that she is in any manner responsible for damages, as claimed by the complainant in his amended bill, for or on account of his supposed purchase of the lands described in complainant's original bill.

Your respondent knows nothing of the pretended contract, as set up by the complainant, except so far as has already been stated in the original bill filed by the complainant, and calls on him for full proof of the bill, the allegations and charges in his said original and amended bills not admitted by the respondent.

Your respondent relies on the original answer filed in this suit by Stephen W. Harris and others, and prays the same be considered as a part of this amended answer, as she does verily believe that the said Stephen W. Harris knew more of the facts and transactions with the said complainant than she or any of the other respondents; and she believes the said Stephen W. Harris has made a fair and true statement of the facts in relation to the pretended purchase of the lands claimed by the said complainant, as set forth in his bill.

Your respondent (Elizabeth Harris) states that she has no knowledge, except by report, of the transactions, or matters and things, charged in complainant's bill, and prays that her late husband's answer (Stephen W. Harris, deceased,) may be taken and read as her answer to the original and amended bills of complainant.

The said Elizabeth Harris admits she had no issue by the said Stephen W. Harris, deceased, and that she is the administratrix of his estate.

Your respondent, having fully answered, prays to be hence dismissed, with reasonable costs, and will ever pray, &c.

ELIZABETH HARRIS, [SEAL.]

STATE OF ALABAMA, *Pike County.*

Before me, Jefferson Buford, an acting justice of the peace in and for said county, personally appeared Elizabeth Harris, who, being duly sworn, according to law, on her oath saith: that the matters and things, denials and allegations, in the answer annexed, set forth and stated herein, so far as stating from her own knowledge, are true; and such facts as are stated from the information of others, contained in her answer, she believes to be true.

ELIZABETH HARRIS.

Sworn to and subscribed before me, this 25th day of November, 1837.

JEFFERSON BUFORD, *J. P.*

THE STATE OF ALABAMA, *Pike County.*

I, John D. Curtis, clerk of the county court of Pike county, do hereby certify that Jefferson Buford, Esquire, before whom Elizabeth Harris took and subscribed the foregoing oath, is, and was at the time thereof, an acting justice of the peace in and for said county, duly authorized and commissioned, and that full faith and credit are due to his acts as such, and that his said attestation is in due form.

Given under my hand and private seal, having no seal of office, this 27th day of November, one thousand eight hundred and thirty-seven.

JOHN D. CURTIS, [SEAL.]

THE STATE OF ALABAMA, *Pike County.*

I, Abraham Miles, judge of the county court of said county, do hereby certify that John D. Curtis was, at the date of the foregoing certificate, and is now, the acting clerk of said county, duly authorized and commissioned, and that full faith and credit is due to all his official acts, and that his said certificate is in due form.

Given under my hand and seal, this day of November, one thousand eight hundred and thirty-seven.

A. MILES, *J. C. C.* [SEAL.]

And at another day, to wit, on the 14th day of February, Thomas Baltzell, the solicitor of the complainant, filed the following replication, viz:

LEON SUPERIOR COURT, *February Term*, 1838.

CARR, *vs.* DUVAL, &c. } In Chancery.

The complainant, saving to himself all and all manner of advantage of exception to the manifold errors and insufficiencies of the answers filed herein, for replication thereto, says that he will aver and prove his said bill and amended bills herein to be certain and sufficient in law; and the said complainant saith that the said answers of said defendants are uncertain, untrue and insufficient, and that the matters and things therein contained are not sufficient to bar him, said complainant, from maintaining his said plea in this behalf. All which matters and things this repliant is ready to aver and prove, as this honorable court shall award; and he humbly prays, as in and by their original and amended bills he has prayed.

THOMAS BALTZELL,
Solicitor for Compl't.

Afterwards, to wit, on the 17th day of March, 1838, the following opinion and decree were rendered by the Honorable Thomas Randall, Judge of the Superior Court for the Middle District of Florida, which *was* in the following words, viz:

This case came up for a final hearing, on bill, amended bill, answers, &c., exhibits and proofs taken in the cause, and is now submitted for a final decree, after a most full and able argument.

The original bill was filed by William A. Carr, to enforce in equity the specific performance of a contract for the sale of a large tract of land in Leon county, Florida, alledged to have been made between a certain Stephen W. Harris and others, co-heirs of William Harris, late of Alabama.

Since filing the original bill, Stephen W. Harris has died, and an amended bill has been filed, making his widow and heirs party to the suit.

A further amendment to the bill has also been filed, by consent of parties, by adding a prayer that, in the event of Stephen W. Harris not being decreed to perform specifically the contract, he be adjudged to pay the complainant such damages as may be ascertained to have been incurred by said complainant in consequence of the breach of the contract.

The alledged contract arises out of and is based upon a correspondence between complainant Carr, and the late Stephen W. Harris, one of the co-heirs of William. By the will of his father, Stephen became the owner of an individual moiety of the land in question, in common with a younger brother. By the death of such younger brother, without issue, before the making of the alledged contract,

his moiety descended to his surviving brothers, Stephen W. Harris and Peter C. Harris, and their three sisters, Julia, the wife of Jos. W. Field, Sarah, the wife of Albert J. Pickett, and Mary Harris, who, with her sister Julia, was an infant at the filing of this bill. All these co-heirs, together with their husbands, and the widow of Wm. Harris, deceased, were made parties defendant to the original bill; and, subsequently, the widow of Stephen W. Harris by the amended bill; and they have all filed answers in the cause. Samuel H. Duval and John S. Shepard, charged in the bill with having made a purchase of the same land after due notice of the prior contract between complainant and the joint proprietors, were made parties to the original bill, and have also put in their answers. The questions submitted to the court for its decision, and which have been fully argued, are: 1st, Whether any certain, definite and binding contract, for the sale of the premises in question, was actually made; and what was the nature of the contract, and which of the parties defendant did it bind? 2d, If any certain, definite and binding contract of sale can be deduced from and based on the letters and negociations between the parties, what will be its operation and effects in the contemplation of a court of equity, and in reference to the present appeal to its jurisdiction? These general questions embrace all the propositions, which have been argued and submitted to the court, although in their consideration they will necessarily require a more minute subdivision and notice.

Should the court decide the first question negatively, it will obviously be decisive of the controversy, and render unnecessary any consideration of the second question.

The contract of sale, if it were ever made and consummated, is to be sought for in the letters which passed between the alledged purchaser, Carr, and Stephen W. Harris. The most material of these letters are filed and exhibited in the cause, and where any of them have not been produced their loss has been accounted for, and their contents, as stated by complainant in his bill, substantially admitted in the answers. In addition to this correspondence, the testimony taken by commission from this court at Athens, Geo., and at Montgomery, Alabama, which has been invoked by complainant, as auxiliary proofs of the contract, will receive the notice to which it may be entitled.

According to the allegations of the bill, the correspondence was opened by a letter from complainant Carr to def't Stephen W. Harris, written some time in June, 1835; of this letter no copy was retained, and in the answer of def'ts it is sworn to have been mislaid or lost. For the contents of it, complainant refers to the answer of Stephen W. Harris, dated Montgomery, Ala., 17th August, 1835, filed in the cause; which respondent S. W. Harris states then, from recollection, to have contained a proposition for the exchange of the land in Florida for the land in Georgia, of complainant, and to have "directed inquiries as to the titles, boundaries, &c." of the Florida land. This is all that is material to remark in relation to that letter.

The answer of the 17th August, after a preface not necessary to notice, is in the following terms: "My father left the land to my young brother and myself, to be divided between him and myself, when I became of age. My brother died long since, and I have just become of ("age" omitted) which entitles me to half the land, which can be divided at any time, and my half is for sale, but it has first to be divided. My price for that is $10 per acre. The remaining half is owned by the brother and sisters of said brother, and I believe they are willing to sell, and their price I expect is $10. Before any part of the tract short of the whole could be sold, it would first have to be divided,—the whole could be sold so, and our price is $10. If you want to buy, and you like the price, I can give you any further information respecting it."

From this letter, these important circumstances appear: First, that he only claimed to own one half the land by the will of his father, though he shews (what he appears not to have been sensible of) that, by the death of his brother, he was also entitled to a share of his undivided moiety, with his brother Peter and his sisters. Next, that the land was undivided, and could not be sold before a division made; so fixed is his mind on this point, that after stating "my half is for sale, but it must be divided," he afterwards repeats, "before any part short of the whole could be sold, it would have first to be divided." It also plainly appears that he does not assert any right or authority to sell more than his own moiety. His words are all expressive of doubt, as to the intention of the other co-heirs: "I *believe* they are willing to sell, and the price I *expect* is $10." He then concludes by stating his own price, and the supposed price of the other tenants in common, and offers further information. If the letter to which it was an answer proposed an exchange of lands, as Stephen in his answer thinks it did, that proposition was virtually rejected. He states his willingness to sell, but does not speak of an exchange. Upon this offer complainant paused until some time between the first and eighth of December following, when he states he wrote to respondent Stephen, representing that he (complainant) had been informed that the tract of land contained twenty-three or twenty-four hundred acres, "and under that impression he proposed to give twenty thousand dollars for it, one third cash, the remainder in one and two years, without interest.

Said Stephen made reply to this by letter, dated 15th Dec'r, 1835, which letter is filed and exhibited in the cause. In that letter he states as follows: "I received your letter yesterday, in which you requested me to give you an accurate account of the number of acres of land contained in the tract. It contains two thousand one hundred and thirty-one and ¼ acres. You shall have the land at your offer, by paying me the interest on the last note. I consider the land worth $10 per acre cash, but by taking the whole tract you shall have it for what I say." And then, after expressing a favourable opinion as to all lands in cotton growing regions, &c. the letter con-

cludes, "If you conclude to take my land, write me where I shall meet or see you, and at what time."

The next in order is a letter from complainant, exhibited in the cause, dated Athens, Geo., Dec. 25th, 1835, directed to respondent Stephen, of the following tenor: "Yours of the 15th inst. came to hand by due course of mail, and I hasten to answer it, although I am sorry to say we cannot trade, for the requisition in your letter, of interest on the last payment, will prevent." Repeating, then, what he was willing to give, viz: $20,000, one third down, and the balance "in two annual instalments, without interest," and which he considered a liberal offer, and enlarging upon the difficulty, loss of time, and expense of clearing new land, and renewing his offer of exchanging a tract of land in Georgia for respondent's Florida land, of which he says he had before written a description, he adds—"Or I will still make you the same offer I did before, beyond which I cannot go, for I can get land of Gen'l Call, on the opposite side of the lake, with some cleared land, a plantation on it, at the same price you hold at. Please communicate to me immediately your final determination as soon as you receive this, as I expect to leave home in January, and will be absent, if I do, for some time;" and then concludes with a N. B. to "direct to Athens, as before."

To this letter an answer was returned from Montgomery, Ala., under date of January 2d, 1836, by respondent, Stephen, which appears among the exhibits. It is in these words: "Your favour, under date of 25th Dec'r, came duly to hand. I have come to the determination to sell you the land on the terms you mentioned. Please write me when and where we shall meet to make the necessary arrangements; your early attention to this matter will oblige, &c.

"Uncertain which of the offers your orator had made had been accepted, (the bill states) he (compl't) addressed another letter to him requiring information whether he would take the money or the lands, and notes or exchange for his place, to which said Stephen replied, &c., by letter dated Montgomery, 16th Jan'y, 1836."

Before considering the import and effect of the last mentioned letter and the acts and doings which followed it, it is material to pause here to take a retrospect of the pending negotiation, and to ascertain whether in whole or in part the correspondence amounted to an agreement or definite contract. For in argument the learned counsel for complainant took the ground that the true contract of sale, which he contends took place between the parties, is evidenced by the preceding letters, or some of them. That in these the "cardinal points were all arranged and agreed, and that the letter of the 16th January following merely went to fix and ascertain some of the incidents and details relating to its fulfilment."

I have already commented on the letter of respondent, Stephen, of the 17th August. That merely contained a description of the land

and the condition of its tenure, with an offer to sell his moiety *after it was divided* for $10 per acre, and an intimation that the whole tract, he *believed* and *expected*, might be bought at the same price. Here then was a specific offer. No answer was returned until some time early in December following, and then so far from assenting to this offer, the plain and obvious purport of the reply (not in proof, but described and assented to by both bill and answer) was a proposition to give $20,000 for the tract, part on credit, *under the impression*, however, that it contained 2,300 or 2,400 acres.

Now, it is obvious not only that this was no acceptance of any offer of Stephen W. Harris, but that the terms of the offer returned from complainant put it out of the power of the owner to accept it, unless he could warrant the quantity of land on which that offer was predicated.

The reply of Stephen proceeds upon this ground. It informs compl't of the exact quantity of the lands, to wit: 2131½ acres, and proposes to sell the whole tract for $20,000, one-third cash, the balance on a credit of one and two years, but with interest "on the last payment," &c.

Here again was no concurrence of the parties—no acceptance of the compl'ts offer, for the letter insists upon a new condition, viz: the payment of interest, which had not been offered by compl't, but the contrary.

As before stated, it was not in the power of Stephen to accept, for the offer was hypothetically upon the "*impression*" that the tract contained a given quantity, which it did not; even if the pecuniary offer had been such as he was willing to accept, which it was not, for he demanded interest, which the other party refuses, and his letter puts it into the form of a new offer or proposition on his side, by requesting "if you conclude to take my land, write me," &c.

The answer of complainant of 25th Dec'r, cited as above, contains a decided rejection of this offer, because of the "requisition of interest," but renews his offer of the agreed principal sum, part cash and the balance without interest—but not until he had also renewed his proposal for an exchange of lands.

Now then, here was a refusal of respondent's terms, and a counter proposal containing two alterations, viz: an exchange of lands, or a purchase on the terms first offered in the letter of the 1st or 8th Dec'r, and renewed in the letter under consideration.

The reply of respondent, Stephen, does accept one of the alternative offers, viz: that of the sale or the terms offered. Now, here was a concurrence of minds, an agreement, if complainant had thought proper at once to ratify and confirm it. He wishes to be informed when and where they shall meet to make the necessary arrangements, and requests complainant's early attention to the matter. At this stage of the negotiation it was in the power of complainant to have made the contract as binding as such a contract could have been made by such a mode of treaty and between such parties, so circumstanced, and to have consummated the same by the needful mea-

sures to be taken. What those needful measures should have been I may have occasion hereafter to remark. At present the object is to ascertain whether the parties mutually came to any common understanding—whether any terms of bargain and sale were definitely fixed. As far as it was competent for respondent Harris to conclude the contract in reply to such a letter, as the one to which his letter of 2d of Jan'y was a reply, he attempts to do so. He accepts one of the alternative offers. But it is a principle of law, as well as of common sense, that an acceptance of an offer should be clearly understood to embrace that offer, with certainty, and should leave no room for ambiguity or doubt.

According to complainant's own showing, he did doubt—he was uncertain which offer of his was acceded to: and wrote back to be informed on the 12th January. Now, in some possible direction, which this transaction might have assumed, by which the position of the parties might have been reversed, it may have become of importance to enquire what reason or justification there was for this hesitation or doubt as to the meaning and intention of Stephen W. Harris, in his letter of the 2d of Jan'y. The terms of the letter propose to *sell*, not to *exchange*. Harris, it appears, had uniformly rejected every offer of exchange, and in a letter of his, dated in 1835 (the month not legible) the original filed or exhibited by complainant, he decidedly rejects any offer of "swapping" (as he calls it) or exchanging his land. But in the present position of the parties, it is not necessary for this court to decide how far his doubt or uncertainty was well or ill-founded. It is enough that, at the epoch in question, he did not consider his offer as definitely accepted; that he considered the treaty as *still open*, and referred it anew to the owner for his determination. A party shall not be permitted to "play fast and loose;" to hold himself free from any obligation, while the negotiation is pending—but after that has closed, has been frustrated, then to occupy the ground which he once abandoned. "By his own acts he shall be judged." On the 12th Jan'y, 1836, when he wrote to respondent, Harris, he did not consider the treaty closed, the contract consummated; for he either did not or affected not to understand what offer was accepted, although the exigency of the cause may induce his learned and ingenious counsel to seek to reinstate his client on the supposed vantage ground of his position at that epoch.

The negociation then being still open, at the last mentioned date, the affair stood precisely upon the offer of the 25th Dec'r. This offer it was competent for respondent to accept or reject specifically, or to propose such modifications as might suit him. The parties were mutually bound, or neither was bound; this is a clear principle of common law and of equity.

We now, then, come down to the letter of the 16th of January, 1836, from respondent Harris to complainant, written at Montgomery. It is in the following terms: "Yours of the 12th inst. is just received, and in reply, have only to remark, that I will accede to your first proposition, as stated in your last letter, that is, one-

third cash, the balance in two equal instalments, with a mortgage on the land, the last two payments to be made in cash; and as all the heirs live in the neighbourhood of this place, it will be the only place where we can conveniently meet to close the bargain. I wish to know your decision per return of mail, as I have three other offers for the land, and can sell it immediately, if you do not wish to take it."

This is the whole letter, and its terms seem plain and unambiguous, unless from the terms "the last two payments to be made in *cash*." If the terms "*cash*" here used means that interest was to be paid, then the whole bargain is afloat and unsettled; but if, as has been assumed in argument on both sides, the term cash is used to denote money, and to repudiate the idea of an exchange of lands, then the letter in other respects is clear and unequivocal.

Respondent Stephen here submits an offer, or rather he renews his proposition to accept complainant's offer, but with these modifications and conditions: 1st, That the bargain must be closed at Montgomery, Ala., where the heirs live; and 2ndly, That he requires an answer by return of mail. These conditions are distinctly set forth. Was it not competent for the vender to prescribe and insist upon them? Complainant's solicitor argues that it was not; that they were either unreasonable or immaterial, and such as a court of chancery may and ought to disregard or dispense with; that a compliance with them was excused by accident and unavoidable obstacles. But before considering these reasons, I propose to examine into conduct and acts of the complainant subsequent to this date. The letter, in due course of mail, must have reached Athens, Geo., about the 21st of January. It is in proof that this letter was taken from the post office on the 28th January. It was answered on the 3rd Feb'y, 1836. In this letter complainant begins by stating "I am still as desirous as ever of taking the land, and have considered myself as bound to you for the money, and you as equally bound to me for titles to the land." He then states, "it will be out of my power to go to Montgomery, as my family is sick, &c.; and our court commencing here next week, I shall have to remain until that is over; then I am compelled, if my wife's health permits, to go immediately to Florida, as you have no doubt heard of the distressing condition of the country there in consequence of the Indian hostilities; so you will have to get all the parties interested together, which I suppose you can easily do, as you say they all live in the neighbourhood, and have the titles perfected to me; and in doing so, the titles must be conjointly by all the heirs interested in the land made and executed, and those who have families, their wives must assign over and relinquish their right of dower to the same; and when it is, that is, the title, properly executed, one of you can carry or send it to me, or some agent at Tallahassee, to receive the first payment, &c., and notes." The letter further recommends, that respondent Stephen and Judge Fields (one of the proprietors in right of his wife) should go to Tallahassee, for, it adds, "I shall require the boundaries of

the land to be defined," &c. The letter then requests an explicit statement of the offers made by others for the land, as alluded in respondent's letter of the 16th Jan'y, to which he thinks there should be no objection, as the writer considered the trade as made, which "puts the land entirely out of the market." The writer then asks that the next communication be made to Tallahassee, renews his wishes to meet him there, promises himself to write from that place on his arrival, and concludes by repeating an inquiry formerly made, in these words, "I must here enquire if any of this land has been taken off or sold to any person, as I have understood by some it contains 2,300, and by others 2,400 acres; but you always told me in our correspondence that you would not divide it."

To this letter no answer was ever received or written; the correspondence, on part of defendants, ceasing with the letter of the 16th Jan'y.

On the 19th Feb'y following, compl't wrote another letter from Macon, Geo., stating that he was that far on his way to Florida; that he had been delayed in setting out, &c.; that he hoped respondent Stephen had the titles completed in the mode before pointed out, &c., stating that said Stephen might start for Tallahassee as soon as he pleased.

On the 27th Feb'y and on the 5th March, letters were written from Tallahassee by complainant to respondent Stephen, referring to former communications, expressing his surprise at respondent's silence, and urging him to come on and settle the business, as he had the first payment ready, &c., and should hold him to his contract.

These last letters close the correspondence on both sides. On the 14th March, complainant Carr went to Montgomery (as he states) with the money for the first instalment, which, with the notes and deeds to be executed, he tendered to respondent Stephen W. Harris, and demanded a compliance with their alledged contract of sale. Harris refused to complete the contract of bargain and sale, admitting and stating that he had already sold the land to def't, Sam'l H. Duval.

Now let us examine the position of the parties at the period of the 16th Jan'y—the import and effect of that letter—and of the acts and doings of complainant subsequent thereto. I hold, that at the date of that letter no binding contract had been made, for reasons already given; offers and propositions had been mutually made, but the minds of the parties had never met, had never concurred on a distinct, certain, final, proposition. When the pecuniary difference between them had been arranged, doubt existed either as to the quantity of the land, or as to which of the alternative offers had been accepted, so as to render necessary to a decision other letters for the purposes of explanation. The treaty, the negociation was still open; both were not concluded or bound at the same time, and thus, for want of mutuality, neither was bound. I further hold that it was in the power of Harris, at that epoch, to superadd new terms and conditions, and even to swerve from previous offers, and to in-

sist upon a larger consideration. He does not think fit to do the last, but he does add new conditions, and makes them precedent to the making of the contract. He requires that the bargain shall be closed at or near Montgomery, in Ala. Was not this a material consideration? Did it not involve a question of considerable expense in the item of travelling, loss of time, &c.? And by what rule of justice (with no previous stipulation or understanding to that effect) was this expense of time and money to be cast upon the vender, in spite of his positive and previous refusal?

If the parties had differed directly in one single dollar of the consideration to be paid, who for one moment could consider either bound until that difference had been reconciled? And yet here a task or duty is sought to be imposed upon the one proffering to sell against his previous consent, which, not only onerous in itself, would probably involve a very considerable expense. Was not the requisition reasonable? Here were terms to be arranged with several different persons, comprising rights of dower, &c., of married women, and their husbands and infants. Deeds and conveyances, and bonds of indemnity to be devised and drawn and executed; all the trouble and expense of preparing and executing these, and the risk (no small one) of preparing them in vain, were involved in the requisition. It is a settled rule of law and equity that the purchaser, and not the vendor, is to prepare and tender the conveyances and the expense to be borne by the former, in the absence of any stipulation to the contrary. Sugden, page 182. Baxter vs. Lewis, 1 Forrest's Eq. Rep. 61.

And yet complainant, in his letter of the 3d Feb'y, expressly requires respondent, Stephen W., to prepare not only his own conveyance, but those of the other tenants in common, to execute and bring them on to Tallahassee. Sufficient and adequate titles in the premises would have been exceedingly difficult to be devised and executed. It is scarcely in the power of the most able conveyancer to devise one single deed which should embrace all the requisites of a legal title in this estate, and which would convey and conclude the rights of the infants heirs.

But the letter of the 16th Jan'y also required an answer by a given time, by return of mail. This was not complied with. The letter reached Athens about the 21st or 22d of January; was taken from the post office on the 28th, and not answered until the 3d of February. But it is contended for compl't that time is not of the essence of a contract in equitable contemplation. This proposition, even in a case to which it is applicable, is too broadly laid down:—"Time may be made of the essence of the contract by the terms of the agreement." 2 Hoven, 20. 6 Mad., 26. 2 Story's Eq., 85. 3 Mad., 447. 13 Ves. 332, 228. Hepbourn vs. Auld, 5 Cranch, 262, 275.

That courts of equity did, in former times, go to a very great extent in dispensing with time in relation to the performance of contracts absolutely made, is certainly true. That they went to an unreasonable extent, all the modern authorities admit and regret. But

that it has ever been established, as the doctrine of a court of equity, that it might be dispensed with against the agreement of the parties distinctly expressed; or, in other words, that the parties "might not make it of the essence of their contract," is denied. An intimation to that effect was once thrown out as an "obitur dictum" by L'd Chancellor Thurlow in the case of Greyson vs. Riddle, 7 Ves. 268; but it was never sanctioned as a rule of equity. It is said by an able commentator to be a mere floating opinion of L'd Thurlow, and all the modern authorities repudiate it. Sugden, 291—2. Loyd vs. Collins, 4 Bro., 66, 330. 4 Ves. Jr., 689. Seton vs. Slade, 7 Ves. Jr., 265. 2 Story's Eq., 87. 1 Yonge, 666 *by a* 415.

But the whole doctrine relied upon in relation to time as affecting contracts, relates to their *execution* when actually entered into. It does not and cannot, in the nature of things, relate to their negociation and formation. There it would be utterly repugnant to right and reason, and opposed by the practice of mankind. A man, having a right to treat and to contract, has an absolute right to say when, where, and within what period he will treat. To say, "I will contract within a certain time and not after; I give you a month, a day, an hour, or a minute, within which to express your consent, or it is no bargain, no contract." Such is the every-day practise of mankind. It is what, in common parlance, is termed a "refusal of a bargain," and must in every case, when insisted on, be strictly complied with. The party receiving the overture must return his answer within the prescribed time, or the opportunity is lost. The party proffering it is only held to his offer pending the prescribed interval, which is called by civilians the "jus deliberandæ," and sometimes the "locus pœnitentiæ."

This obvious distinction did not escape, of course, the learned solicitors of the respondents; and while they admitted the general doctrine of the immateriality of time in equitable contemplation, as affecting the execution of *contracts*, they challenged their learned adversary to produce a case, where any court had held time to be immaterial, to be unessential, when it related to the formation, to the making of the contract: when, in the offer, the overture or treaty, a given time was prescribed, within which the answer or acceptance was required to be made. The challenge was safely made, for no such case was produced or can be found. The absolute right of sellers, in this respect, no court can regulate or restrict. A strict compliance with the prescription, no circumstances can excuse, no court dispense with. A bidder might, with the same propriety, seek to arrest the hammer of the auctioneer, while he pondered on the bargain, or retired to attend to his domestic or other duties. The principle is precisely the same. So strictly do courts guard this right, that they will not suffer the requisition to be departed from in form or mode, nor inquire how far a departure from the terms might, or might not prejudice. The case of Eliason vs. Henshaw, 4 Wheaton, 225, is in direct authority to this point. There, the party proposing to purchase flour directed "an answer by return of wagon to Har-

per's ferry," where he was staying for "a time, his residence being Georgetown. The wagon did not, in fact, return to Harper's ferry, and the owner of the flour wrote an answer the next day, addressed to the other party at his place of business, Georgetown, and sent by first mail, accepting his proposition. The Supreme Court decided that this departure from the terms prescribed invalidated, or rather defeated, the contract. They say, "it is an undeniable principle of the law of contract, that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification or departure from those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation on either." Not only in the above case did the court consider the time to be material, but that the place constituted an essential part of the offer. This is a strong, a leading case, and one directly applicable to the case at bar. The only answer to it, the only attempt to distinguish the two, rests upon the circumstance that the case cited from 4 Wheaton was at law, and that the case under discussion is in equity. This I conceive is not a satisfactory answer. The question in both courts is the same—was a contract made between the parties; was the offer of the one so received and answered by the other, as to amount to a binding acceptance? It was not a question how the contract should be evidenced, or the remedy should be administered on the contract, (the only point upon which courts of law and equity treat differently the subject,) but whether there existed any contract whatever. And in this last respect both courts treat the subject alike, and apply to it the same rules; and how could it be otherwise? the matter to be determined is a legal fact, and that must be one and the same in all courts, however different the remedies to be applied to it in different courts. Even the statute of frauds and perjuries must receive the same construction in courts of equity as in courts of law, except in cases of fraud &c. 2d Story, 57. Sugden, 163.

Nor can the accident or unavoidable delay, set up in the bill, and relied upon as such, form an excuse for non-compliance. It was not made out that the delay was unavoidable from the 28th January, to 3d February; the delay is not explained or excused. The absence of the party was voluntary and determined upon, in reference to his own convenience, with which the other party had nothing to do. He but prescribed his own terms, which were reasonable and possible; and if the other, from accident, was prevented from availing himself of them, it was his misfortune merely; but if it had been otherwise, I know nothing to prevent a seller, thus offering his property, from prescribing as a "*condition precedent*," unreasonable or even impossible conditions.

For the above reasons I am clearly of opinion that no certain, definite and binding contract was concluded or made between the parties. I may go further, and say, that between the parties to this treaty or negociation, no contract, which this court could, or ought to en-

force to the extent sought for in this bill, would have been made, even if the answer to the letter of the 16th of January had been prompt, definite, and certain. I mean as resulting simply from that correspondence. I do not mean to assert that a contract, such as a court of chancery will decree to be specifically executed, may not be made by correspondence: the law I know is otherwise. Sugden, page 163, says: "Thus agreements for sale of an estate have been decreed on mere letters, which have passed between the parties, but not unless all the terms of the agreement were therein specified; and even this (he adds) was going a great way." 2 Hovenden, page 48 & 49, & Kennedy vs. Lee, 3 Meir, 451, are authorities to the same point. But we must look to the relation of the parties, in the present case, and the condition of the subject matter about which they treated.

The correspondence was conducted by Stephen W. Harris alone, one of the joint heirs, with a distinct avowal of his limited interest in the land; that it was undivided, and no part of it would be sold until it was divided. With regard to his right to sell, he asserts no power to dispose of the portions of the other joint heirs, some of whom he states to be married women, and minors, &c. The other parties, in interest, have all jointly and severally answered the bill, and distinctly denied that their brother, Stephen, was authorized by them to sell their portions. The only exception is in the case of respondent Pickett, who admits that he did know of, and approve of the letters written by Stephen. But Pickett was only the husband of one of the co-heirs, a minor, and had no right to bind or sell her property. 2 Hovenden, 9, 10. 2 Ves. 676. 1 Paige, 494. The participation, then, of these parties as charged in the bill is not proved, and is expressly denied. Here was no case of part performance—no money paid or received—no possession delivered of the property. The case must be sustained on the contract alone.

Now it is obvious that it was not competent for Stephen to bind these other parties. The widow of the testator of the land having a right of dower, the married women, joint proprietors, could only sell or transfer their interests, or bind themselves by regular, formal, legal, instruments. As respects the minors, their interests are even more strictly guarded, and with much more difficulty to be reached or affected. Even on the hypothesis of a contract made between compt. and Stephen, as asserted in the bill, the rights of the other joint heirs could not be affected by this court. But upon the assumption of a contract, it is argued that the decree of the court may and should reach Stephen W. Harris' interest, though without resort against the others. It is a sufficient reason for the court to refuse this prayer, that such was not the intention of the parties to the alledged contract. Stephen refused to sell his individual interest. He would only sell after division, or in common with the other heirs. This was avowed from the beginning, and governed and regulated the whole transaction. There *was* reasons for the refusal, which may have been dictated as well by a regard for his own interests as for that of his brother.

Another sufficient reason against such a decree against Stephen

alone, even if the facts of the case would warrant it, is, that the bill does not seek or ask for it. It seeks to affect all the parties and all the land; even in a proper case for a decree of performance, when the whole property cannot be reached, the party complt. *not being bound to take less than the entirety contracted for*, must, if he elect to take less, modify the prayer of his bill accordingly. In argument, it is true, complt's solicitor did contend for this limited right; but the bill contains no such prayer; the formal usual prayer, "for other and further general relief," &c. not being adequate to that effect. But a conclusive objection to this limited relief arises from the fact, that since the answer put in, Stephen, the respondent, has died, and his death has been suggested, and his widow and collateral heirs made parties. How can this court reach or affect, by its decree, the right of dower in his widow? How has that been affected by his acts during his lifetime? It is obvious that the widow's right of dower remains unaffected by the actings and doings of her husband; and even if this court had any power to decree a specific performance by his collateral heirs, one of whom, at least, was a minor at his death, it is quite certain it would not exercise the power to the derangement of the relative rights of the respective tenants. A court of equity will not decree specific performance, when it will cause the disinheriting of the heirs, by making that personal which would otherwise be real estate, or otherwise operate injuriously upon vested interests, but will leave the vendor to his remedy at law.

The doctrine as to the power and duty of courts of equity to decree specific performance, has been too broadly laid down by complainant's solicitor. A court of equity will not, in every case of a clear definite written contract, decree specific performance as a matter of course. Sugden lays down the rule as follows in substance, "Decreeing specific performance is a matter of sound legal discretion with a court: the contract to justify it ought to be certain and fair in all its parts." Sugden on Ven. 154–5.

Mr. Justice Story, in his valuable treatise of equity, lays down the same rule, and says "that the court will, on the whole circumstances, judge whether it be such an agreement as ought to be enforced. The statute of frauds does not say that a written agreement shall bind, but that an unwritten agreement shall not bind."—2 Hoven, p. 8, 9. 2 Story's Eq. 47.

In page 79 he adds, "and here it is important to notice a distinction between the case of a plaintiff seeking a specific performance in equity, and the case of a def't resisting it. We have already seen that the specific execution of a contract in equity is matter not of absolute right in the party, but of sound discretion in the court. Hence it requires a much less strength of case to resist a bill to perform, than to enforce a specific performance." And after stating many cases where it will not decree, he adds, "and generally not in cases where it would be inequitable under all the circumstances."

Such I consider it would be under the circumstances of this case, giving to the correspondence between the parties all the effect com-

plainant contends for. He has not shown himself "eager, prompt, and ready" to perform his part of it. He seems to have acted from the beginning under a mistake as to the legal or equitable consequences growing out of a contract, made or to be made between himself and Stephen W. Harris, and under that mistake to have given himself little or no trouble to fulfil its terms. The convenience of the sellers was uniformly disregarded, and made secondary to his own arrangements and convenience. If he had been properly advised on the subject, he would have known that such a contract could only have been made effectual by the utmost promptitude and decision on his part; that the contract could only be consummated by personal dealings with all the parties in interest, unless he could feel assured (as he probably did) that their interests would lead them to be anxious to fulfil this, *is* an advantageous contract. If such a motive influenced him he was mistaken again, and must abide the consequences.

The reasons above expressed render unnecessary any particular notice of the equitable relation in which respondents, Duval and Shepard, stand in this suit. If, as I am clearly convinced, there never did exist any contract whatever, which this court can or ought to have enforced against the original contracting parties, or any of them, the equitable liabilities of these defendants, as subsequent purchasers, being supervient and resulting in their nature, never came into existence. If the vendors had not made a binding contract with complainant, they had a right to sell to any one else with or without notice of the previous negociation. There is no case for the application of the "Doctrine of Notice," when there is no prior subsisting contract. This is too obvious to require further remark. If any effect is to be produced by this subsequent rule, it furnishes another cogent reason, when such reasons already abound for this court to refuse to decree specific performance, not out of regard to the subsequent purchasers, but out of that sensibility and regard which courts of equity always evince for the rights and interests of "Femmes converts and Infants." The land has been sold at a higher price than complainant was to have given for it. Why should this court deprive them of this advantage, when, by no act of theirs, could they in the prior negociation have divested themselves of it? Why should the court not only deprive them of this positive advantage, but visit upon them the penalties and liabilities which they may since have incurred in consequence of the subsequent sale? This last consideration alone would induce a court of equity to withhold from a vendee this peculiar remedy, and to turn him over to a court of law for redress against those who may have caused him the injury. Hemelt vs. Yorlding, 1 Sch. & Lef. 549, Ld. Redesdale's opinion. In no case in a contract by husband and wife for the sale of wife's property, will a court of equity decree specific performance, although the husband might have influence to induce wife to join. Such is the modern doctrine. 2 Hoven, p. 10. 10 Ves. 305. 5 Ves. 548. 2 Jack. & Walk. 426. 8 Ves. 514. 1 New R. 269.

One or two other points which have been much relied upon argument, may require a brief notice. It is charged in the bill, as an evidence of consent by the co-heirs, that some of them joined in the preparation of deeds of conveyance of the land to complainant Carr. The answer admits that two deeds were prepared and signed, one by Stephen and the other by A. J. Pickett and his wife, and by M. G. Harris, who was a minor. These deeds never were delivered, and were destroyed before complainant Carr went to Alabama, and before the contract was executed with Duval. I do not deem it at all material that some of the parties may have pondered upon the offer of complainant, and inclined to accept it, even after he had, by non-acceptance of the offer in due season, and on the terms proposed, relieved them from its obligatory force. The "qualification" and "departure" from the terms proposed "invalidated" the offer, according to the authority cited from 4 Wheaton, unless the same were afterwards agreed to by the party making it. The acts of some of the parties in joining in deeds, at best of no validity, they being "infants and one feme converte," which deeds were never delivered, but destroyed, cannot amount to such "consent" as revived their contract. Such consent should have been communicated to amount to an *agreement.*

But, give the utmost effect to it, it is only a parol evidence of a contract. Per se, it cannot constitute a contract, for it contains or expresses no terms.

It cannot be used as ancillary to a written contract; for the rule of law is express, that the terms of a written contract cannot be supplied by parol—that a contract cannot rest partly on written and partly on parol evidence: 2 Story's Eq., p. 76. The contract, if it be evidence of a contract, remains still such as a court of equity cannot, and ought not, to decree specifically to be performed. Nor can any greater effect be given to the acts of the complainant, in proceeding to Alabama, and there tendering the deeds, money and notes, supposing that tender to have been made with due solemnities and in due form. His action was too tardy; the season was passed; the subject of the contract had even passed from their control by sale to another. But if this previous tender of the conveyances, &c., from the purchaser to the vender, was necessary to enable the latter to sue, as his counsel admit and contend, it is important to examine the deeds actually tendered in this case, to see how far they strengthen his equitable claim upon the court. These deeds appear with the deposition of H. W. Hilliard. They consist of a deed of conveyance, designed to convey the whole, undivided tract in Florida, to be executed by Stephen W. Harris alone; and a deed, or mortgage, from complainant Carr, the grantee, to said Stephen, and to secure to him alone the whole purchase money. In the deed tendered to Stephen, he is made "to covenant that he is lawfully seized in fee of the premises, has a good right to sell and convey the same," and he is made to sign a general warranty of title "against all persons." As a compensation to him for these extra-

ordinary powers to be exercised and liabilities to be incurred by him, the deed of mortgage secures to him alone all the consideration to be paid. It is needless to remark that, to such a proposition, to such a tender, he could make but one reply, and that was a prompt, unhesitating refusal. He might well exclaim "non hæc in fædera veni," —such was not my contract. And if it be needful for complainant to tender deeds to the vender, if that were a precedent condition on his part, he has not yet fulfilled it. Such a deed, which the vender had no power to execute, and which contained covenants which he was under no obligations to sign, he might well refuse to execute. The exhibition of these deeds, then, so far from strengthening the equities of complainant, materially, if not fatally, injure his cause.

The experiment serves to illustrate and prove the inchoate character of this bargain, as it is called, and to show how utterly impossible it was for complainant to proceed to its completion, without the consent and co-operation of all the parties, up to its consummation.

I have thus, with great care and no little labor, adverted to all the arguments, facts and considerations which seemed to me to have any bearing on this cause. I am sensible that much more has been said than the exigencies of the case required. Many points have been discussed, more out of respect to the arguments of the learned counsel than because they were needful to justify the decree of the court. The cause is certainly important, as regards the amount involved, but seems to have derived an adscitious value from the very controversy itself.

With these remarks, I submit the following

DECREE.

This cause came up for final hearing upon original bill, amended bill, answers, exhibits and proofs taken in the cause, and, after argument, was submitted to the court; and, as the case presents no ground of equity to justify the court in granting the prayer of the bill, it is therefore, on this 17th day of March, 1838, ordered, adjudged and decreed that the bill be dismissed, with costs.

THOMAS RANDALL, *Judge.*

And afterwards, to wit, on the 4th day of July, 1836, the following certified copies of the will of William Harris, with four letters from Stephen W. Harris, marked as exhibits B, C, D and E. The copy of the will is as follows:

THE STATE OF ALABAMA, *Montgomery County.*

In the name of God, amen. I, William Harris, being of a sound mind and memory, do make and ordain this my last will and testament. I resign my soul to its Maker, God, and my body to its mother, Earth, to plainly and decently interred; and, as it regards

this world's goods, *with* which it has pleased the Almighty to bestow upon me, I dispose of in the following manner:

Item. I give unto my wife, Mary D. Harris, the following named negroes, viz: Bolden, Sal, Daniel, Jim and his wife Maria, with their children, Silus, Wilkerson, Henry, Cornelius, and Martha; with an equal share of my household and kitchen furniture, and stock of every kind; together with an equal share of the incomes of any crops, while her negroes remain in common stock with those of my children; with the use of one quarter section of land, (during her natural life, or widowhood,) where I now live, or on the lands devised to my two youngest sons, whichever may be most agreeable to herself.

Item. I lend unto my daughter, Julia Field, during her natural life, and at her death to be equally divided among the heirs of her body, four hundred acres of land, situated in Leon county, and Territory of Florida: said land lies in range one, east, and township one, south and east—the north half of section thirteen, and the east half of the northeast quarter of fourteen.

Item. I give unto my daughter, Julia Field, three negroes, Susan, Easther and Clarissa.

Item. I give unto my son, Peter Harris, section eleven, and the east half of the northeast quarter of ten, and the east half of the southeast quarter of said section, in range one, east, and township one, south and east, lying in Leon county, and Territory of Florida.

Item. I give unto my two sons, Stephen and William, all my tract of land lying on Lake Jackson, in range one, west, township two, north and west, in Leon county, Territory of Florida, to be equally divided between them, when Stephen becomes of age.

Item. I lend unto my daughter, Sarah, during her natural life, and at her decease to be equally divided among the heirs of her body, section twenty-nine, and the south half of the southwest quarter of section twenty, all lying in township seventeen and range eighteen, situate in Montgomery county, and State of Alabama.

Item. I lend unto my daughter, Mary, during her natural life, and at her decease to be equally divided among the heirs of her body, section thirty-two, in township seventeen, and range eighteen, lying in Montgomery county, and State of Alabama.

Item. I give unto my daughters, Sarah and Mary, the following other described lands, viz: the southwest and northwest quarters and west half of the northeast quarter of section twenty-eight, in township seventeen, and range eighteen, lying in Montgomery county, and State of Alabama, to be equally divided between them, when either becomes of age, or marries.

Item. I give all the rest of my property, not already divided, unto my sons, Peter, Stephen and William, and my daughters, Sarah and Mary, to be equally divided between them, as they severally become of age, or my daughters marry.

Item. I give my executors full power to move my negroes, or a

part of them, or all my family, to my lands in Florida, should they think it most conducive to the interest of my estate.

Item. I do hereby constitute and appoint my wife, Mary D. Harris, executrix, and Peter C. Harris, Joseph W. Field, Stephen Pearce and Edmund Pearce, executors, to my last will and testament.

Item. I do hereby direct and authorize my executors to make a deed, whenever a grant is obtained from the land office, of the S. W. quarter of section twenty, of the north half of quarter section, it being in township seventeen, and range eighteen, to Joseph Fitz Patrick, or his heirs, he having paid me in full for the same.

Item. I give unto my daughter, Julia Field, a note of hand on John Coffee, which called for five hundred and forty-two dollars, but a part of which has been since paid; and a note of hand on John L. Lumpkin, for one thousand dollars, due on the twenty-fifth day of December, eighteen hundred and twenty-five, the name of Joseph W. Field and the word dollars interlined, before signed, and the latter clause of the then item erased, but signed.

In testimony whereof, I hereunto set my hand, and affix*ed* my seal, this 5th day of October, A. D. 1825, and of the American Inde*pendence* the 50th year.

WILL. HARRIS, [SEAL.]

Signed and acknowledged in presence of

CLEMENT BELINGBEY.
BENJAH L. BILL.
BENJAMIN BRACK.

The following certificates were endorsed on the above will:

THE STATE OF ALABAMA, *Montgomery County.*

I, James E. Belser, Clerk of the county court in and for said county, do hereby certify that the foregoing is a true transcript of the record of the will of William Harris, deceased, as appears from the files of my office.

Given under my hand and seal of office, this the 15th day of March, A. D. 1836, and of American Independence the 60th year.

[SEAL.]

Attest: JAMES E. BELSER, *Clk. C. C. M. C.*

THE STATE OF ALABAMA, *Montgomery County.*

I, Benajah S. Bibb, presiding judge of the county court of said county, do hereby certify that James E. Belser is the acting clerk of our said court, and that all his official acts should be regarded as such.

Given under my hand, this 15th day of March, 1836.

B. S. BIBB, *J. C. C. M. C.*

STATE OF ALABAMA, *Montgomery County.*

I, Benajah S. Bibb, presiding judge of the county court aforesaid, do hereby certify that James E. Belser, whose name appears to the foregoing certificate, is, and was at the time of making the same, clerk of the said court, and that his said attestation is in due form.

Given under my hand, the 15th day of March, A. D. 1836.

B. S. BIBB, *J. C. C. M. C.*

Exhibit B. as follows:

MONTGOMERY, ALABAMA, August 17th, 1838.

MR. H. CARR:

In complying with your request in your last letter, I hardly know how to begin. I should have answered it long since but for two reasons, one on account of my health, and another for the want of knowledge concerning the land, and I am not able now to give you any satisfaction relative to what part of the land could be sold, or all of it; but I will endeavour to give you a description of the way in which it is held. My father left the land to my young brother and self, to be divided between him and myself when I become of age. My brother died long since, and I have just become of which entitles me to half the land, which can be divided at any time, and my half is for sale, but it has first to be divided; my price for that is ten dollars per acre. The remaining half is owned by the brother and sisters of said brother, and I believe they are willing to sell, and their price I expect is $10. Before any part of the land, short of the whole tract, could be sold, it would first have to be divided; the whole could be sold so, and our price is ten dollars. If you want to buy, and you like the price, I can give you any further information respecting it. Yours,

S. W. HARRIS.

Exhibit C.

MONTGOMERY, ALA. Dec. 15th, 1835.

MR. WILLIAM A. CARR:

Sir—I received your letter yesterday, in which you requested me to give you an accurate account of the number of acres of land contained in the tract. It contains two thousand one hundred and thirty-one and ¼ acres. You shall have the land at your offer, by paying me the interest on the last note. I consider the land worth ten dollars an acre, cash; but, by taking the whole tract, you shall have it for what I say. All lands in the cotton-growing region cannot other-

wise than rise in value; in this State, lands of common quality, in the woods, are selling from twelve to twenty dollars per acre. If you conclude to take my land, write me where I shall meet or see you, and at what time.

Yours, sincerely, STEPHEN W. HARRIS.

Exhibit D.

MONTGOMERY, Jan'y 2d, 1836.

WM. A. CARR, Esq.

Dear Sir—Your favour, under date of Dec. 25, came duly to hand. I have come to the determination to sell you the land on the terms you mention. Please write me when and where we shall meet to make the necessary arrangements. Your early attention to this matter will oblige

Yours, respectfully, STEPHEN W. HARRIS.

Exhibit E.

MONTGOMERY, January 16th, 1836.

MR. WILLIAM A. CARR:

SIR—Yours of the 12th inst. is just received, and in reply have only to remark that I will accede to your first proposition, as stated in my last letter; that is, one third cash, the balance in two equal instalments, with a mortgage on the land—the last two payments to be made in cash; and as all the heirs live in the neighbourhood of this place, it will be the only place where we can conveniently meet to close the bargain. I wish to know your decision per return mail, as I have three other offers for the land, and can sell it immediately if you do not wish to take it.

Respectfully, S. W. HARRIS.

Afterwards, to wit, on the 16th day of August, 1836, a commission was formally issued by the clerk of the superior court for Leon county, to take the deposition of Susan B. Savage, Edward R. Ware, Susan Worthern and Josiah A. Clark, under which commission the following evidence was given. The defendant, objecting to any commission being issued. The evidence of Edward R. Ware, and Josiah A. Clark, as follows, viz:

First interrogatory. Do you know the parties, plaintiff and defendants?

To the first interrogatory, they both answer, they know the plaintiff only.

Second interrogatory. Do you or not know of the absence of the

complainant from Athens in Georgia, during the month of January last; if so, please state the time of his absence, its continuance, &c.?

To the second interrogatory, Edward R. Ware answers, that he knows that William A. Carr, the plaintiff, was absent from Athens, his residence, in the month of January last, (1836,) and that he was absent some time, but deponent cannot say how long, precisely.

Third interrogatory. If complainant was absent this time, where had he gone?

To the third interrogatory, he says, that from the plaintiff and his family, he understood that he went to Augusta in this State, and Wellington, in South Carolina.

Fourth interrogatory. Do you, or either of you, know of the illness of Mrs. Carr, wife of complainant, about this time; if so, please to state it, how long she was confined, and whether it would have been proper for her husband to have left during that period?

To the fourth interrogatory, he answers and saith, I know that the wife of the plaintiff was sick during the month of January last; he was the family physician of plaintiff. Mrs. Carr was taken sick during the absence of Mr. Carr, and was very ill during his absence, and at the time he returned, and so remained for some time after his return, and in my opinion it would have been improper for him to have left her.

Fifth interrogatory. If you know any thing further that will benefit plaintiff in this case, please state it.

To the fifth interrogatory, he answers, he knows nothing more.

To the second interrogatory, Josiah A. Clark answers, that he knows that Mr. William A. Carr, the plaintiff, was absent from Athens, his residence, in the month of January last, 1836; he was absent some time, and until the last days of said month.

To the third interrogatory, he answers, that he was informed by plaintiff that he had been to Augusta.

To the fourth interrogatory, he answers, that he knows nothing of the illness of Mrs. Carr.

To the fifth interrogatory, he answers, that he was assistant postmaster at this place, (Athens,) and Mr. Carr had a box in the *post* office, and we kept an account with Mr. Carr for his postage; that on the return of Mr. Carr from Augusta, he took from the office, on the twenty-eighth of January, a letter which he afterwards showed me; the postage on the said letter was eighteen and three-fourth cents, which is the rate of postage from Montgomery in Alabama; and about the same time Mr. Carr enquired the most direct route to send a letter to Montgomery, Alabama, and did about the same time mail a letter for that place, and he knows nothing further, except that the letter Mr. Carr showed me was postmarked at Montgomery, Alabama, and had been about the usual time in coming.

EDWARD R. WARE.
JOSIAH A. CLARK.

Answered, sworn to, and subscribed before us this first day of October, 1836.

CHARLES DOUGHERTY, *Commissioner.* [SEAL.]
PHILIP CLAYTON, *Commissioner.* [SEAL.]

Afterwards, to wit, on the 24th day of May, 1837, another commission was issued, to take the depositions of William Lester, Alexander J. Fisher, Ben. Chaires, and John Newcomb, witnesses for the complainant.

To William Lester.

First interrogatory. Do you know the parties in the above case?

To the first interrogatory, he answers, and says, he does.

Second interrogatory. Do you or do you not know that one of the defendants, Samuel H. Duval, knew that the complainant, William A. Carr, had purchased the tract of land now in controversy, and known as the Harris' tract of land, before he, the said Samuel H. Duval, went to Alabama, to purchase said tract of land?

To the second interrogatory, he answers, and says, that the defendant, Samuel H. Duval, must have known, from what witness told him, the witness having heard read the correspondence that took place between Carr, the complainant, and Mr. Harris, and that Duval admitted he had learned the fact of Carr's purchase from Mr. Whitehead. Witness further says, that Duval said he did not believe Carr had a title for the land.

Third interrogatory. Do you or do you not know that the said Duval knew of the correspondence that had taken place between complainant and Stephen W. Harris, one of the defendants, in reference to the purchase of said tract of land?

To the third interrogatory, witness answers and says, he does not know whether Duval knew of correspondence which took place between Carr and Harris.

Fourth interrogatory. Did or did not said Duval know that complainant was in waiting in Tallahassee, and did wait sometimes for the arrival of said Harris, or for some authorized agent of his, to come and close the bargain, receive the payment in hand, and give titles to said complainant?

To the fourth interrogatory, witness answers in the negative.

Fifth interrogatory. Did you or not frequently advise complainant to go to Montgomery, Alabama, and see Harris in person: if yea, state what was complainant's reply to you?

To the fifth interrogatory, witness answers that he did advise Carr to go and purchase said land, and also knows that he, Carr, was in waiting, in Tallahassee, to see Harris on that business.

Sixth interrogatory. Did or did not said Duval endeavour by every possible means in his power to find out, whether complainant had received titles for said tract of land? If yea, please state what said Duval

done after he found out that complainant had not yet received titles for said land?

To the sixth interrogatory, witness answers, that he does not know any thing of Duval's endeavours to find out whether or not Carr had received the titles for the land.

Seventh interrogatory. State all you know that will make for complainant?

To the seventh interrogatory, witness answers, that he knows nothing further.

WILLIAM LESTER.

Sworn to and subscribed before us this 17th June, 1837.

H. ARCHER,
W. W. WADDELL,
Commissioners.

Alexander J. Fisher, as follows:

Interrogatory 1st. Do you know the parties in the above cause?

To the first interrogatory, he answers and says he knows W. A. Carr, S. H. Duval and John S. Shepard.

Interrogatory 2d. Did you ever see the complainant Carr sign two promissory notes on the evening previous to his departure for Montgomery, Alabama? If yea, please state to whom said notes were made payable, and in payment of what they were to be given?

To the second interrogatory, he answers and says that Carr left with witness two notes of hand signed by said Carr, payable to Stephen W. Harris, each six thousand six hundred and sixty-six $\frac{6}{100}$ dollars, as witness believes, which notes were enclosed in a letter directed to Major Chaires, and were to be given in payment of the Harris tract of land.

Interrogatory 3d. Did you see complainant Carr write a letter to Stephen W. Harris, of Montgomery, Alabama? If yea, please state the purport of said letter—and what was the object of complainant in writing said letter?

To the third interrogatory, witness answers and says he does not recollect.

Interrogatory 4th. When the complainant Carr left for Montgomery, Alabama, did or did he not leave with you the letter written to Stephen W. Harris, and the before mentioned notes, together with money for the first payment and a letter to Major Chaires, all to be delivered to him by you?

To the fourth interrogatory witness answers, that Carr, before leaving Tallahassee, left with him a letter directed to Major Chaires, also a letter for Stephen W. Harris, together with the two notes above referred to, and Carr deposited with Mr. Betton six thousand five hundred dollars, and made arrangements with Mr. Betton to advance the balance, being one-third of the purchase money.

Interrogatory 5th. Answer fully all that may benefit complainant.

To the fifth interrogatory, witness answers and says he knows nothing more.

A. J. FISHER.

Sworn to and subscribed to before us this 17th June, 1837.

H. ARCHER,
W. W. WADDEL,
Commissioners.

Ben Chaires, as follows:

Interrogatory 1st. Do you know the parties in the above cause?

To the first interrogatory witness answers and says, he knows William A. Carr, S. H. Duval and John S. Shepard.

Interrogatory 2d. Did or did you not receive, through the hands of Alexander J. Fisher, instructions from complainant, Carr, in reference to the purchase of a tract of land in Leon county from Stephen W. Harris? If yea, state what they were, and what you had received from the complainant?—were notes or money left in your hands?

To this second interrogatory witness answers and says, that two notes of hand signed by William A. Carr, payable to Stephen W. Harris for two-thirds of the purchase of the land, were deposited with witness. Witness also states that he had a large amount of money also deposited with him (which he did not count,) and was instructed that the notes and money were to be paid to Stephen W. Harris in the event of said Harris calling at the bank during the absence of Mr. Carr. Witness thinks that the instructions were particularly given to Mr. Betton.

Interrogatory 3d. Please state fully all you know?

To the third interrogatory witness answers, that after Mr. Duval returned, he (Duval) mentioned to witness that he knew of Carr's purchase or contract for the land before he left, but that he knew also he (Carr) had not received titles. Witness also states that he knew of Carr's waiting some time for the arrival of Harris—was anxious to see him, and requested witness to inform him of Harris's arrival, should he come to Tallahassee, and that Carr had a considerable amount of money in the bank for the avowed object of paying Harris for the land.

BEN CHAIRES.

Sworn to and subscribed to before us this 17th June, 1837.

H. ARCHER,
W. W. WADDEL,
Commissioners.

John Newcomb's evidence, as follows:

Interrogatory 1st. Do you know the parties in the above cause?

To the first interrogatory he replies, he knows Carr, Duval and Shepard.

Interrogatory 2d. Were you or were you not engaged or requested by Samuel H. Duval, one of the defendants, some time in the year 1836, to ascertain whether or not the complainant Carr had ever received titles from Stephen W. Harris for a certain tract of land lying in Leon county? If yea, state what tract of land it was, and what conversation took place between you in reference to said tract of land, and the time when you had that conversation.

To the second interrogatory he replies, that he was applied to by Samuel H. Duval to ascertain whether William A. Carr had titles to the land known as the Harris tract on Lake Jackson. On his saying that he did not know whether he had or had not—that Samuel H. Duval offered him one hundred dollars to find out for him. The time was January, 1836.

Interrogatory 3d. Did or did not said Duval admit to you that the complainant Carr had purchased said tract of land? If yea, state in what manner he did so—and all the conversation you had with him on that subject?

To the third interrogatory he replies, that Samuel H. Duval said that he had understood that Wm. A. Carr had purchased the land.

Interrogatory 4th. Did you ever, or did you not, give said Duval or any of the defendants any information on the subject of said tract of land? If so, please state what that information was—where you obtained that information, and from whom? State fully, and the time when you gave him that information.

To the fourth interrogatory he replies, that he stated to Samuel H. Duval that he considered the tract of land the best in Florida; he knew it from personal examination. The time was January, 1836.

Interrogatory 5th. State all you know?

To the fifth interrogatory he replies and says, that he knows nothing further, excepting that in the conversation aforesaid, Samuel H. Duval said that he wished to buy the land, and deponent gave him what information he had about the titles.

JOHN NEWCOMB.

Answered, subscribed and sworn to before us, the undersigned commissioners, this 31st day of May, 1837.

W. W. WADDEL,
JOHN TURNER,
H. ARCHER,
Commissioners.

On the 10th day of June, the evidence of Benjamin Whitehurst was taken, under a commission issued out of the superior court, on 24th May, 1837, which is as follows:

Interrogatory 1st. Do you know the above named parties?

To the first interrogatory, the witness answers and says, he does.

Interrogatory 2d. Do you or do you not know when it was that William A. Carr, the above complainant, took possession of the tract of land, in Leon county, known as the "*Harris tract of land?*" If yea, state whether it was before or after Samuel H. Duval, one of the defendants, went to the State of Alabama, and whether, also, it was before said complainant, Carr, went to Alabama.

To the second interrogatory, the witness answers and says, he does, and that it was before the defendant, Samuel H. Duval, went to the State of Alabama, and it was also before the complainant, Carr, went to Alabama.

Interrogatory 3d. Did you ever know, of your own knowledge, that the complainant, Carr, had purchased said tract of land? If yea, state whether John S. Shepard, one of the defendants, ever acknowledged to you that Carr had purchased said tract of land.

To the third interrogatory, the witness answers and says, that he does not know that complainant had purchased said tract, only by what complainant said to him, and by having seen the correspondence between the complainant and Stephen W. Harris. Witness says, John S. Shepard did not acknowledge to him, in direct terms, that he knew that Carr had purchased said tract of land.

Interrogatory 4th. Did you ever have any conversation with John S. Shepard upon the subject of this tract of land? If so, state the substance of that conversation, and more particularly from whom Shepard told you he had heard that Carr had purchased said land, but had never received titles for the same.

To the fourth interrogatory, the witness says, he did have a conversation with John S. Shepard upon the subject of this tract of land. The witness says that John S. Shepard told him that he, Shepard, had heard a report in Tallahassee that Wm. A. Carr had purchased the Harris tract of land, but that he did not believe it. However, he, Shepard, was determined upon knowing whether the report was true or not; that he would go up to his plantation next morning, thinking that he would see some person on his way to his plantation who would inform him of the fact; and on his way he saw Judge Whitehead hunting, and rode up to him, and, after saluting him, told Judge Whitehead that he, Shepard, understood that Carr had purchased the Harris tract of land: the judge replied to him, yes. He then asked Judge Whitehead if he was certain of that fact. The Judge replied, yes. Mr. Shepard then said he asked Judge Whitehead, "has he got a title for it?" the Judge replied, "no, he has not got a title, but in a day or two he is going on to get titles." Shepard then said that he told Judge Whitehead "good morning," wheeled his horse, rode about one hundred yards up the road, so that Judge Whitehead might not see him, turned about, and pushed to Tallahassee—went to Samuel H. Duval's, and told him that Carr had not titles, and that he had inferred so, and said to Duval, "now go and make the purchase; give twelve dollars for the land per acre, if you cannot get it for less, but I think you can get it for ten, for it

is one of the finest speculations in the whole country:" and Saml. H. Duval started the next morning to see Harris. This is all the conversation had with John S. Shepard on this subject by witness.

Interrogatory 5th. Did or did not John S. Shepard acknowledge to you that he had sent Saml. H. Duval to Montgomery, Alabama, to purchase said land? If so, please state the same, and all the conversation that transpired; state fully.

To the fifth interrogatory, the witness says, he (Shepard) did acknowledge to him that he sent, or rather told Saml. H. Duval to go to Stephen W. Harris, in Montgomery, Montgomery county, Alabama, and purchase said land. Witness says he has already answered this in the fourth interrogatory.

Interrogatory 6th. State all you know, as if particularly interrogated thereto.

To the sixth interrogatory, witness says that he knows nothing further.

BENJAMIN C. WHITEHURST.

Sworn and subscribed to before us, the commissioners named in the within commission, this tenth day of June, eighteen hundred and thirty-seven.

JABEZ B. BULL,
THOS. E. LENDENBERGER,
Commissioners.

Afterwards, to wit, on the 24th day of May, 1837, a commission was issued to take the depositions of Henry W. Hilliard, William Gilmer and John Curry.

Henry W. Hilliard's evidence, as follows, viz:

Interrogatory 1st. Do you know the parties in this cause?

Answer to int. 1st. With Mr. Carr and Mr. Duval I am acquainted: I also know Stephen W. and Peter Harris.

Interrogatory 2d. Were you, or either of you, present at a demand made by William A. Carr, the complainant, of Stephen W. Harris, Peter G. Harris, or any of the heirs of ——— Harris, of the title to a tract of land lying in said county of Leon, and Territory of Florida, a contract for the purchase of which was depending between the said Carr and the said Stephen, or said heirs? If so, please state what you know about it, the time when and the place where the demand was made.

Answer 2d. I was present at a demand made by William A. Carr, the complainant, of Stephen W. Harris, for titles to a tract of land lying in Leon county, Florida, near Lake Jackson, and which land said Carr asserted had been contracted to him by said Harris. This demand was made in the town of Montgomery, Alabama, near the residence of said Harris, and in March, A. D. 1836. To the demand, said Harris replied that he had not sold the land to Carr,

asserting that Carr had not complied with the terms of the contract, which had been the subject of correspondence between them.

Interrogatory 3d. Was a deed for the land, with the money, together with a mortgage and notes for the purchase money, presented by the said Carr? If yea, please state the same; and if the original of the deed and mortgage are in your possession, or copies, please append them to your deposition, and state what occurred between said Carr and said Harris.

Answer 3d. A deed was tendered by said Carr to said Harris for the land above mentioned, for his signature, accompanied with the money required for the first payment, and a mortgage upon the land, to secure the succeeding payments, and the several promissory notes for the sums yet to fall due. Harris refused to comply, and again denied having sold the land to Carr. Carr then reminded Harris of the contract previously existing between them for the sale of the land, and told him that he would compel him to make him a title. The deed and mortgage are hereto appended, marked A and B.

Interrogatory 4th. Did or did not Stephen W. Harris, at the time of the demand aforesaid, have in his possession several letters of said Carr's? If so, was a demand made of them, and was Harris notified to preserve them?

Answer 4th. I am unable to say whether Harris had or had not certain letters from Carr in his possession. I heard Carr speak of letters he had written, and I think he did notify Harris to preserve them.

Interrogatory 5th. If you know any thing more that will benefit complainant, state it fully.

Answer 5th. Those are the circumstances, so far as I remember them. In the whole interview, Harris seemed to be very guarded.

HENRY W. HILLIARD.

STATE OF ALABAMA, *ss.*

In pursuance of the foregoing commission, we, James P. Daniel and Francis Burgher, two of the commissioners named the annexed commission, have caused Henry W. Hilliard, one of the witnesses named, to come before us, at Montgomery, Alabama, on the 16th of August, 1837; and he, having been duly sworn, did depose as above to the several interrogatories, and wrote them down in his own proper hand, signed the same: all which we do hereby certify to the hon. superior court for the middle district of Florida, to be held in the county of Leon, under our hands and seals, at Montgomery, Alabama, 16th August, 1837.

FR. BURGHER, [SEAL,]
J. P. DANIELS, [SEAL,] } *Commissioners.*

Annexed to the foregoing interrogatories, the following papers were referred to:

A.

Know all men by these presents, that I, Stephen W. Harris, for and in consideration of to me in hand paid, by William A. Carr, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell, enfeoff and confirm unto the said William A. Carr, all that certain messuage or lot of tract of land lying in Leon county, Florida, on Lake Jackson, in range one, west, township two, north and west, bounded by said Lake Jackson, by lands of John Whitehead and J. Shepard, and by the meridian line; to have and to hold the aforegranted premises to the said William A. Carr, his heirs and assigns, to their use and behoof, forever. And I do covenant with the said William A. Carr, his heirs and assigns, that I am lawfully seised in fee of the aforegranted premises; that they are free of all incumbrances; that I have a good right to sell and convey the same to the said William A. Carr, his heirs and assigns: and that I will warrant and defend the said premises to the said William A. Carr, his heirs and assigns, forever, against the lawful claims and demands of all persons. In witness whereof, I, the said Stephen W. Harris, have hereunto set my hand and seal, this day of March, in the year of our Lord one thousand eight hundred and thirty-six.

Signed, sealed and delivered, in presence of } [L. S.]

THE STATE OF ALABAMA, *County.*

I, do hereby certify that, on the day of 183 the above named personally appeared before me, and acknowledged the above instrument to be free act and deed.

Given under my hand,

B.

THE STATE OF ALABAMA, *Montgomery County.*

This indenture, made this day of March, in the year of our Lord one thousand eight hundred and thirty-six, between William A. Carr, of the one part, and Stephen W. Harris, of the other part, witnesseth, that the said William A. Carr, for and in consideration of the sum of twenty thousand dollars, to him in hand paid, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, had granted, bargained, sold, released, and, by these presents, doth grant, bargain, sell, release and confirm unto the said Stephen W. Harris, his heirs, executors, administrators and assigns, all that certain messuage, tract, lot or parcel of land, lying in Leon county, Florida, on Lake Jackson, in range one, west, township two, north and west, bounded by lands of John Whitehead and J. Shepard, and by the meridian line, together

with all the appurtenances thereunto belonging,—to have and to hold the said messuage, tract, lot or parcel of land, hereinbefore described, mentioned and granted, unto the said Stephen W. Harris, his heirs, executors, administrators and assigns, to their only proper use, benefit and behoof, forever. Provided always, nevertheless, and it is the express understanding of the parties hereto, that if the said William A. Carr, his heirs, executors, administrators, and assigns, shall and do well and truly pay or cause to be paid unto the said Stephen W. Harris, his heirs, executors, administrators and assigns, the several sums provided to be paid by the said William A. Carr, unto the said Stephen W. Harris, which sums are mentioned in two certain promissory notes, signed by said William A. Carr and payable to said Stephen W. Harris, each for six thousand six hundred and sixty-six dollars and sixty-seven cents; one to fall due on the 16th day of January, in the year of our Lord one thousand eight hundred and thirty-seven, and the other to fall due twelve months thereafter,—then, and from thenceforth, as well this indenture as the estate hereby granted, shall cease, determine, and become absolutely null and void, to all intents and purposes; any thing hereinbefore mentioned to the contrary in any wise notwithstanding.

And afterwards, to wit, on the 2d day of May, 1836, the following copy of a bond for titles was filed, viz:

THE STATE OF ALABAMA, *Montgomery County.*

Know all men by these presents, that we, Stephen W. Harris, as principal, and Peter C. Harris, Mary D. Harris, Albert J. Pickett, and Joseph Fitz-Patrick and Joseph W. Field, as securities, acknowledge ourselves to be held and firmly bound unto Samuel H. Duval, of the county of Leon, in the Territory of Florida, in the penal sum of forty thousand dollars, to be paid to him, his heirs and assigns; for which payment, well and truly to be made, we and each of us bind ourselves, our heirs and assigns, by these presents. Sealed with our respective seals, and bearing date this 11th of March, 1836.

The condition of this obligation is such, that whereas we have this day sold to Samuel H. Duval the following lands in the Territory of Florida, to wit:

Lot number one, of fractional section 26, in township two (2) north, of range one west, in the district of lands offered for sale at Tallahassee.

Lot number two, of fractional section twenty-six, in towship two north, of range one west, in the same district.

The west half of the southwest quarter of section twenty-four, in township two north, of range one west, in the district of lands aforesaid.

Lot number two, of fractional section twenty-three, in township two north of range one west, of the district aforesaid.

The southeast quarter of section twenty-four, in township two north, of range one west, in the district of lands aforesaid.

The southeast quarter of section twenty-*five*, in township two north, of range one west, of the district of lands aforesaid.

The west half of the southwest quarter of section twenty-five, in township two north, of range one west, of the district of lands aforesaid.

The east half of the southwest quarter of section twenty-five, in township two north, of range one west, of the district of lands aforesaid.

The east half of the northeast quarter of section twenty-five, in township two north, of range one west, in the district of lands aforesaid.

Lot number three, of fractional section twenty-six, in township two north, of range one west, of the same district.

Lot number four, of fractional section twenty-six, in the same township, range and district as last mentioned.

Lots number five, six and seven, of fractional section twenty-six, in township two north, of range one west, of the district of lands aforesaid.

Lot number two of fractional section thirteen, of the township, range and district aforesaid.

The west half of the northwest quarter of section twenty-five, in township two north, of range one west, of the district of lands aforesaid.

The west of the northeast quarter of the same section, township, range and district last mentioned.

The east half of the northwest of section twenty-four, of the same township, range and district.

The northeast quarter of section twenty-four, of the same township, range and district as last mentioned.

Lot number one, of fractional section twenty-three, of the same township, range and district.

The east half of the northwest quarter of section twenty-five, of the same township, range and district aforesaid.

The west half of the northwest of section twenty-four, of the township, range and district aforesaid.

The east half of the southwest quarter of section twenty-four, of the township, range and district aforesaid, for the sum of twenty-one thousand three hundred and fifteen dollars, (being ten dollars per acre) one-third of which is to be paid in Tallahassee in twenty days, and notes, bearing interest from date, for the balance, payable in one and two years from the date hereof, respectively, each for one-half of that remaining sum to be paid at .

Now, if the said parties shall, within twelve months from this date, deliver to the said Samuel H. Duval, from the heirs of the late William Harris, father of said Stephen W. Harris, (together the necessary relinquishments of dower from the wives of such of said heirs as are married, and executed by the husbands of the female

heirs,) a deed to the fee simple of said lands, with the usual covenants of warranty and seisure upon receiving a deed of mortgage, with powers of sale to secure the payment of the money which shall be then due, or which should thereafter become due, then this obligation to be void; otherwise to have full force, effect and virtue.

S. W. HARRIS, [SEAL.]
ALBERT J. PICKETT, [SEAL.]
PETER C. HARRIS, [SEAL.]
MARY D. HARRIS, [SEAL.]
JOSEPH FITZPATRICK, [SEAL.]

Witness:
HUGH S. WALSH.
A. H. SAMPLE.

The above is a true copy of the original.

JAS. C. HASSON.
A. J. FISHER.

It is the understanding, that Samuel H. Duval is to have the possession of the lands until the time when the titles *is* to be made, according to the terms of the condition of the within obligation.

Witness my hand and seal.

It is also understood, that the mortgage shall be executed at the time titles are made.

(Signed) S. W. HARRIS, [SEAL.]

In vacation, 19th March, 1838, came William A. Carr, and prayed an appeal from decree rendered him at chambers, on 17th inst., which was granted by clerk, it being ten days after said decree.

On the same day, following appeal bond was filed, which was as follows, to wit:

Know all men by these presents, that we, William A. Carr and Turbutt R. Betton, are held and firmly bound unto Stephen W. Harris, Mary D. Harris, Peter C. Harris, Albert J. Pickett, and Sarah his wife, Mary S. Harris, Joseph W. Field and Julia his wife, Samuel H. Duval and John S. Shepard, in the just and full sum of two thousand dollars, to be paid unto the said Stephen W. Harris and others, their certain attorney, executors, administrators or assigns, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 19th day of March, in the year one thousand eight hundred and thirty-eight.

The condition of the above obligation is such, that whereas by a decree of the judge of the superior court of Leon county, rendered at chambers, in the city of Tallahassee, on the 17th day of March, 1838, in a suit in Chancery, between the above named William A. Carr, complainant, and the above named Stephen W. Harris and

others, defendants, it was ordered, adjudged, and decreed by the said court, that the said complainant's bill should be dismissed with costs, from which decree the said William A. Carr hath appealed to the court of appeals. If, therefore, the said William A. Carr shall prosecute the said appeal with effect, or pay and satisfy all such costs as shall be awarded against him, in case the said judgment shall be affirmed, then this obligation to be void, else to remain in full force and virtue.

WILLIAM A. CARR, [L. S.]
TURBUTT R. BETTON, [L. S.]

Signed, sealed and acknoweledged in presence of me, the date above. S. W. D. STONE, *D. C.*

BILL OF COSTS.

IN THE SUPERIOR COURT OF LEON COUNTY, *May Term*, 1838.

WILLIAM A. CARR,
vs.
SAMUEL H. DUVAL and others.

Clerk Hilliard—Docketing case 12½, entering att'y and docketing 18¾, filing 26 papers 1 62½, issuing commission to take interrogatories $1 00, entering motion for an injunction 12½, docketing same 12½, entering order thereupon *upon* 12½ - - -		$3 31¼
Clerk Duval—filing 23 papers $1 42, issuing 3 commissions to take depositions $3 00, copies of interrogatories in each 2 50, certificates to each 75c, taking 1 affidavit 25, 1 affidavit 25, copy of bill of complaint with letters thereto attached, and seal and certificate to ditto 6 80, copy of amended bill of compl't with certificate 75, 1 order of publication 12½, copy of ditto certified 25, entering 3 orders of court 37½, decree 25, entering appeal 25, taking appeal bond 50, taxing costs 25, making bill of costs and duplicate 50, issuing execution, docketing, filing, &c., 81¼c, - - - - - - -		19 03¼
Marshal Ran—2 copies service and ret. of notice, - - - - - -	$1 50	
1 copy service and ret. of ditto, - -	75	
		2 25
Duval—Service and ret. of notice in these depositions,		1 50
Printer's fee—Knowles for advertising, - -		8 50
		$34 59¼

17th March, 1838.

MIDDLE DISTRICT OF FLORIDA, *Leon county, ss.*

I, Richard G. Wellford, clerk of the superior court of the middle district of Florida, in and for the county of Leon, do hereby certify that the foregoing forty-four pages *is* a true transcript of the record and proceedings in a certain cause in chancery, lately depending in the said superior court, between William A. Carr, complainant, and Samuel H. Duval and others, defendants, with all things touching the same, as fully and wholly as the same now exist among the records of my office.

In testimony whereof, I have hereunto set my hand and annexed the seal of said court, the 30th day of [SEAL.] October, A. D. 1838, and of the Independance of the United States the sixty-second year.

R. G. WELLFORD, *Clerk.*

And heretofore, to wit, on Tuesday, the 29th day of January, 1839, this cause was partly heard upon the transcript of the record of the decree aforesaid, and the arguments of counsel, and it is continued till to-morrow for a further hearing thereof.

And on the next day, to wit, on Wednesday, the 30th day of January, A. D. 1839, this cause was further heard upon the transcript of the record of the decree aforesaid, and the arguments of counsel, and it is continued till to-morrow for a further hearing thereof.

And on the next day, to wit, on Thursday, the 31st day of January, A. D. 1839, this cause was further heard upon the transcript of the record of the decree aforesaid, and the arguments of counsel, and is continued till to-morrow for a further hearing thereof.

And on the next day, to wit, on the 1st day of February, A. D. 1839, this cause was fully heard upon the transcript of the record of the decree aforesaid, and the arguments of counsel, but because the court is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

And on another day, to wit, on Thursday, the 14th day of February, A. D. 1839, came the parties by their counsel, whereupon the transcript of the record of the decree aforesaid being seen and inspected, it seems to the court here that there is no error in the said decree. Therefore it is ordered, adjudged and decreed, that the same be affirmed, and that the appellees recover of the appellant their cost about their defence in this behalf expended.

The honorable Judge Randall, presiding judge, Judges Reid and Jourdan, having sit in the trial of the above cause, Judge Reid dissented to the above decree.

And on the same day, to wit, on the said 14th day of February, A. D. 1839, on motion of the appellant, by his attorney, an appeal is granted him to the next term of the Supreme Court of the United States, on his giving bond and security with Turbutt R. Betton, his

security, in the sum of five hundred dollars, conditioned to pay all costs that may accrue in the said Supreme Court.

And on another day, to wit, on the 18th day of February, 1839, came the appellant, by his counsel, and presented his appeal bond filed in said case for approval, which was approved by the court.

Which appeal bond is in the words and figures following, to wit:

Know all men by these presents, that we, William A. Carr and Turbutt R. Betton, are held and firmly bound unto Samuel H. Duval, John S. Shepard, Peter C. Harris, Joseph W. Field, and Julia his wife, Albert J. Pickett, and Sarah his wife, Mary D. Harris, Elizabeth Harris, John H. Gindrat and Mary G. his wife, heirs of Stephen and William Harris, deceased, in the penal sum of five hundred dollars. To the payment whereof we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 16th day of February, A. D. 1839.

The condition of this obligation is such, that whereas the said Carr has prayed for and obtained an appeal to the Supreme Court of the United States from a decree of the court of appeals of the Territory of Florida, rendered their January term, 1839, affirming a decree of the superior court for the county of Leon, in said Territory, dismissing the bill in chancery of said Carr against said Duval and others, with costs.

Now, if the said Carr shall pay all costs that may accrue or be awarded against him by the said Supreme Court of the United States in the case aforesaid, then this obligation to be void, otherwise remain in full force and virtue.

WILLIAM A. CARR, [SEAL.]
TURBUTT R. BETTON, [SEAL.]

Signed, sealed and acknowledged in the presence of
R. G. WELLFORD, *Clerk.*

The following letter, altho' not embraced in the record from the Leon superior court to the court of appeals, was read in the argument of said cause before the court of appeals.

MONTGOMERY, A., *Ju.* 25, 1835.

Mr. A. CARR—Sir, I received your letters relative to the swapping of my land in Florida for some you have in Georgia. My answer is this, that I don't wish to swap my land for land any where, unless it was in this State. But if you will sell your land I will sell you mine. I would like you to see my land, if you have not seen it; I don't think that there is a tract of land in Florida superior to it.

Yours, &c.
STEPHEN W. HARRIS.

WILLIAM A. CARR.

TERRITORY OF FLORIDA, *County of Leon.*

I, Richard G. Wellford, clerk of the court of appeals for the said territory, do hereby certify, that from page 1 to page 53, in the foregoing record, both inclusive, is a correct copy of the record and proceedings in court of appeals, except that by the order of the presiding Judge, the opinion of the Judge in the court below is inserted. The following interlineations in the record are correctly made, to wit: in page one, in the thirty-fourth line, between the words "four" and "lot," the following words are interlined, "lot number one of fractional section twenty-three; lot number two, of fractional section twenty-three." On page seven, in the fortieth line, between the letters "B" & "D," the letter "C" is interlined; on the same page, in forty-second line, between the words "existence" and "he," the words "of which" are interlined. On page fourteen, in the forty-third line, between the words "on" and "my," the words "any of" are inserted. On the twenty-third page, in the seventh line, between the words "has" and "been," the word "already" is inserted.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this the first day of June, in the year eighteen hundred and thirty-nine, and of the Independence of the United States, the sixty-third year.

R. G. WELLFORD, *Clk.*

427.

SUPREME COURT OF THE UNITED STATES.

No. 37.

THE UNITED STATES PL'FF IN ER.

vs.

JACOB KNIGHT & AL.

IN ERROR TO THE CIRCUIT COURT, U. S., FOR THE DISTRICT OF MAINE.

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Assignment of Errors.

THE UNITED STATES
vs.
EDWARD KNIGHT et al.

To the Justices of the Supreme Court of the United States of America, to be holden at Washington, in the District of Columbia, and within and for the said States, on the second Monday of January, in the year of our Lord one thousand eight hundred and forty, and for re-examining final judgments and decrees in civil actions, &c., in the several Circuit Courts of said United States.

Complain the United States aforesaid by Joseph Howard, attorney for said States, for the Maine district, that, in the record of a suit wherein the said United States were plaintiffs, and Jacob Knight, Benjamin Knight, Isaac Knight, and Edward Knight were defendants, in the circuit court of said United States, for the first circuit and the Maine district aforesaid, holden at Wiscasset, within and for the Maine district, before the Honourable Joseph Story and the Honourable Ashur Ware, judges of said circuit court, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-eight, whereof an authenticated transcript in the said Supreme Court shall be produced, the following manifest errors have intervened, to wit: That the judgment of said circuit court, upon the statement of facts in said suit agreed upon by the parties, was, that there had been no escape by which the bond declared on in the plaintiff's writ had become forfeited.

There is error also in this, to wit: that, by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was, that the said United States take nothing by their writ; whereas, by the laws of the land, the said judgment ought to have been given that the said United States recover of the said Edward Knight and others (the said defendants) the sum of seventeen thousand four hundred and ninety-four dollars and four cents, being the penalty demanded in said suit.

Wherefore the said United States, by their said attorney, pray the consideration of the justices aforesaid, and that the judgment aforesaid, and every part thereof, may be reversed.

JOSEPH HOWARD,
Attorney for the United States
for the Maine District.

April, 1839.

THE PRESIDENT OF THE UNITED STATES.

UNITED STATES OF AMERICA, *ss:*

To the Honoruable the Judges of the Circuit Court of the United States for the First Circuit and District of Maine, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States of America, plaintiffs, against Edward Knight, Jacob Knight, Benjamin Knight, and Isaac Knight, all of Portland, in said Maine district, gentlemen, defendants, in a plea of debt, a manifest error hath happened, to the great damage of the said United States, as by the complaint of Joseph Howard, Esquire, attorney of the United States for said Maine district, appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held: that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honourable Roger B. Taney, Chief Justice of the said Supreme Court, this twenty-fourth day of April, in the year of our Lord one thousand eight hundred and thirty-nine.

JOHN MUSSEY,
Clerk of the Circuit Court of the United States for Maine District.

Allowed by

ASHUR WARE.

MAINE DISTRICT, ss.

June 24th, A. D., 1839.

Pursuant to the within writ, I do hereby, under my seal, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, to the Justices of the Supreme Court of the United States at the city of Washington, to be holden at the time within mentioned.

[SEAL.]

ASHUR WARE,
Judge of the United States in and for Maine District.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

MAINE DISTRICT, *ss.*

To the Marshal of the District of Maine, or his deputy, greeting:

Whereas, in the record and in the judgment of a suit which was determined in our circuit court of our said district, holden at Wiscasset, within and for our said district, on Monday, the first day of October last, in which suit the United States were *pl't'ffs*, and Edward Knight, Jacob Knight, Benjamin Knight, and Isaac Knight, all of Portland, in said district, gentlemen, were *def'ts*, manifest error, it is said, has intervened, to the great damage of the said United States, as by the complaint of Joseph Howard, Esquire, their district attorney, we perceive: which record and judgment we, for certain reasons, have caused to be brought before the justices of the Supreme Court of the United States, next to be holden at the city of Washington, in the District of Columbia, on the second Monday of January, A. D. eighteen hundred and forty, and also for hearing such errors as aforesaid, in order that the error therein, if any there be, may be duly corrected.

We command you, therefore, that you make known unto the said Edward Knight and others, that they be before our said justices of our said Supreme Court, to hear the record and judgment aforesaid, if they shall see cause, and to do and receive whatever the same Court shall consider thereupon.

Given under my hand, and the seal of said circuit court, this twenty-fourth day of April, in the year of our Lord, eighteen hundred and thirty-nine.

[SEAL.]

ASHUR WARE.

DISTRICT OF MAINE, *ss.*

April 29th, 1839.

I have this day served all the persons within named with attested copies of the within precept, as follows, to wit: I delivered to Edward Knight and Jacob Knight, each, such copy in hand, and I left such copy at the last and usual place of abode of Benjamin Knight, and Isaac Knight, to wit, at their dwelling-houses, respectively, in Portland.

JOHN HARRIS, Junior, *Dept. Marshal.*

Fees.	4 Services,	$8 00
	4 Copies,	4 00
	Travel,	5
		$12 05

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

FIRST CIRCUIT OF THE UNITED STATES, *District of Maine, ss.*

To the Marshal of our District of Maine, or his deputy, greeting:

We command you to attach the goods or estate of Jacob Knight, Benjamin Knight, Isaac Knight, and Edward Knight, all of Portland, in our said district of Maine, gentlemen, to the value of eighteen thousand dollars, and, for want thereof to take the bodies of said defendants, (if they may be found within your precinct,) and them safely keep, so that you have them before our circuit court, next to be holden at Wiscasset, within and for our district of Maine, on the first day of October next: then and there, in our said court, to answer unto the United States of America, in a plea of debt, for that the said defendants, at said Portland, on the thirtieth day of January, now last past, by their writing obligatory of that date, sealed with their seals, and here in court to be produced, bound themselves unto said States, in the sum of seventeen thousand four hundred and ninety-four dollars and four cents, to be paid to said States by said defendants on demand. Yet, though requested, said defendants, or either of them, have not paid said sum, but owe and detain it, to the damage of the said plaintiffs, as they say, the sum of eighteen thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness the honorable Roger B. Taney, at Portland, the fifteenth day of September, in the year of our Lord, one thousand eight hundred and thirty-eight. [SEAL.]

J. MUSSEY, *Clerk.*

MR. OFFICER:—Attach sufficient personal property to respond debt and costs; in want of personal, attach real estate.

JOSEPH HOWARD,
U. S. Dist. Attorney.

MAINE DISTRICT, *ss.*

Sept. 17*th*, 1838.

Pursuant to this precept, I have this day attached all the right, title, and interest, that the within named defendants have in and to any and all real estate, within the State of Maine, and particularly in the city of Portland, however the same may be situated and bounded. I also attached two vessels, called the brigs Franklins, also one horse, chaise, and harness, all of the supposed value of eighteen thousand dollars, (this being the fourth attachment on the same property,) and on the same day I gave the within named Benjamin, Isaac, and Edward, each a summons in hand, and left a summons at Jacob Knight's dwelling-house, and return this writ as within directed.

D. WESCOTT, *D'y Marshal.*

Fees: 4 Services, $8 00; Travel, $2 50.—$10 50.

CIRCUIT COURT OF THE UNITED STATES, *Maine District, ss.*

UNITED STATES
vs.
JACOB KNIGHT and others.

And now the said Knight and others come and defend, when, &c. where, &c., and, reserving to themselves the right of giving any special matter in evidence, for plea, say, that the writing obligatory in the plaintiffs' declaration, set forth and declared upon, is not the deed of them, said defendants; and of this they put themselves on the country, by

FESSENDEN, DEBLOIS, AND KINSMAN,
Their Attorneys.

And the plaintiffs do the like.

JOSEPH HOWARD,
U. S. Dist. Attorney.

Know all men by these presents, that we, Jacob Knight, and Benjamin Knight, both of Portland, within the district of Maine, merchants, as principal, and Isaac Knight and Edward Knight, both of said Portland, as sureties, are holden and stand firmly bound and obliged unto the United States of America, in the sum of seventeen thousand four hundred and ninety-four dollars and four cents, to be paid unto the said United States, their certain attorney or assigns. To the payment of which sum, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, in the whole and for the whole, firmly by these presents.

Sealed with our seals. Dated at Portland, the thirtieth day of January, A. D. 1838.

The condition of the above written obligation is such, that whereas the said Jacob and Benjamin Knight have been and now are imprisoned in the prison at Portland, in the said Maine district, by virtue of an execution issued against them on a judgment obtained against them by the said United States, at the district court of the United States for Maine district, which was begun and holden at Portland, within and for the district of Maine, on the first Tuesday of December, A. D. 1837, for the sum of eight thousand four hundred and sixty-two dollars and thirty-six cents, principal, and one hundred and sixty-one dollars and seventy-nine cents for interest thereon, to the nineteenth day of December, aforesaid, and costs of suit taxed at twenty-four dollars and forty-seven cents, and also for all legal interest that may accrue on said sum of $8,462 36, from the said 19th Dec. until said judgment shall be fully discharged and satisfied, with one hundred cents more, for one writ of execution, and the officer's fees and charges for commitment, taxed at ninety-seven dollars and forty cents.

Now, if the said Jacob Knight, and Benjamin Knight, from the time of executing this bond, shall continue true prisoners, in the cus-

tody of the gaoler, within the limits of the gaol yard, until they shall be lawfully discharged, and shall not depart without the exterior bounds of said gaol yard, until lawfully discharged from said imprisonment, according to the laws of the United States in such cases made and provided, and commit no manner of escape, then the said obligation to be void, otherwise to remain in full force.

JACOB KNIGHT, [SEAL.]
BENJ. KNIGHT, [SEAL.]
ISAAC KNIGHT, [SEAL.]
EDWARD KNIGHT, [SEAL.]

Signed, sealed, and delivered, in presence of
ALBERT SMITH.

CUMBERLAND, *ss.*

January 30th, 1838.

We, the subscribers, two disinterested justices of the peace for said county, quorum unus, do approve of the sureties named in the foregoing bond.

CHARLES B. SMITH.
SAMUEL SMALL.

CIRCUIT COURT OF THE UNITED STATES,
Maine District, October Term, 1838.

THE UNITED STATES OF AMERICA,
vs.
JACOB KNIGHT, BENJAMIN KNIGHT,
ISAAC KNIGHT, and EDWARD KNIGHT.

In this case the parties agree to the following statement of facts. On the thirtieth day of January, last past, the said Jacob and Benjamin were committed to the gaol in the city of Portland, on an execution issued on a judgment in favor of the said United States against said Jacob and Benjamin, whereupon the said Jacob and Benjamin, as principals, and the said Isaac and Edward as sureties, gave the bond declared on in this suit; that said Jacob and Benjamin continued to remain within the limits of the town of Portland, exclusive of the islands, and did not depart therefrom up to the time of the commencement of this suit, nor have they since departed therefrom; but neither the said Jacob nor Benjamin, from the time of the execution of said bond, nor afterwards, at any time, lodged in the night time, within the walls of said gaol, but remained at large within the limits of said town of Portland, exclusive of the islands belonging to the same, both day and night.

If, upon the foregoing facts, the court are of opinion that the condition of said bond has been broken by the said Jacob and Benjamin,

and that they have made an escape, then the said court are to render judgment, to be entered as of said October term, and as on verdict rendered for the said United States; and if the court shall be of opinion that the obligation of said bond has not been broken, then judgment to be rendered in manner aforesaid for the said defendants.

And each party reserves to themselves the right to a writ of error, to reverse any such judgment as may, as aforesaid, be rendered by said court in the case.

A copy of the records of the court of sessions for the county of Cumberland, hereunto annexed, may be referred to as a part of the facts of this case.

For the defendants,

FESSENDEN & DEBLOIS.

For the plaintiffs,

JOSEPH HOWARD,
U. S. Dist. Attorney.

At a court of general sessions of the peace for the county of Cumberland, begun and holden at Portland, in said county, on the last Tuesday of May, A. D. 1787, being the 29th day of said month.

Justices present:

Enoch Freeman, Esq.
William Thompson, Esq.
John Lewis, Esq.
Edmund Phinney, Esq.
Robert Southgate, Esq.
John Frothingham, Esq.
Isaac Parsons, Esq.
William Gorham, Esq.
George Peirce, Esq.
David Mitchell, Esq.
Samuel Freeman, Esq.
Richard Codman, Esq.
Samuel Small, Esq.
Daniel Davis, Esq.
Joshua Fabyan, Esq.
John Dean, Esq.
Peter Noyes, Esq.

The court took into consideration the establishment of proper boundaries of the gaol yard in said county, and determined the same as follows, viz:

Beginning at the bottom of Love Lane, at low water mark; thence up said Lane, including the houses on each side thereof to the northerly side of Back street; thence down said Back street, including the houses on both sides thereof, to King street, from thence down said King street, including houses on both sides thereof, to low water mark; thence by low water mark to the first bounds, including all the ground and buildings within the aforesaid limits.

Recorded by

SAMUEL FREEMAN, *Clerk.*

A true copy of record.
Attest:

CHARLES FOX, *Clerk.*

At a court of general sessions of the peace, for the county of Cumberland, begun and holden at Portland, in said county, on the third Tuesday of October, being the 16th day of said month, A. D. 1798:

Present the following justices, viz:

William Thompson,	Andrew Dunning,
William Gorham,	George Lewis,
John Lewis,	Peter T. Smith,
Isaac Parsons,	John Greenwood,
Robert Southgate,	William Martin,
Josiah Thatcher,	Stephen Longfellow,
Samuel Merrill,	Samuel P. Russell,
Benjamin Dunning,	Ammi R. Mitchell,
William Widgery,	Stephen Punington,
Paul Little,	John Dean,
Ichabod Bonney,	Enoch Perley,
Jonah Peirce,	Elisha Williams.

The committee appointed to consider suitable limits for the gaol yard, report, as their opinion, that the limits or bounds of the town of Portland, exclusive of the islands, be fixed and determined as the boundaries of said gaol yard.

Their report is accepted, and the said limits fixed and determined as the bounds of said gaol yard accordingly.

Recorded by

SAMUEL FREEMAN, *Clerk.*

A true copy of record.

Attest:

CHARLES FOX, *Clerk.*

At a court of sessions, begun and holden at Portland, in and for the county of Cumberland, on the second Tuesday of September, (being the tenth day of said month) A. D. 1822.

Justices present:

Hon. Woodbury Storer, Chief Justice.

Phineas Ingalls,
William Hasty,
Peleg Chandler,
Secomb Jordan,
} Associate Justices.

The court having, with much deliberation, attended to the subject of the limits of the gaol yard, which was under consideration at their last March term, as is fixed and established by the court of sessions, October term, A. D. 1798, are of opinion, that, inasmuch as the laws relating to imprisonment of debtors have lately been revised by the

Legislature, and undergone a material alteration: that the rights of individuals and the public will be as well secured, and the convenience of the citizens and public essentially promoted, by an extension of the bounds of the gaol yard.

It is therefore ordered by the court, that from and after the day of passing this order, *that* the bounds of the gaol yard be extended over the whole county, and to the exterior limits thereof: which are hereby fixed and established as the bounds of the gaol yard for the said county of Cumberland.

And the clerk of the court is directed to publish the foregoing order for the information of the citizens of said county, in each of the newspapers printed in the town of Portland.

September 14th, 1822.

Recorded by WM. T. VAUGHAN, *Clerk.*

A true copy of record.
Attest: CHARLES FOX, *Clerk.*

UNITED STATES, *Maine District, ss:*

At a circuit court of the United States for the first circuit, begun and holden at Wiscasset, within and for Maine District, on Monday the first day of October, in the year of our Lord one thousand eight hundred and thirty-eight.

Present: the honorable Joseph Story, associate justice of the Supreme Court, and the honorable Ashur Ware, District judge.

The United States of America, plaintiffs, vs. Edward Knight, Jacob Knight, Benjamin Knight, and Isaac Knight, all of Portland, in our said district of Maine, gentlemen, defendants.

In a plea of debt for that the said defendants, at said Portland, on the thirtieth day of January, now last past, by their writing obligatory of that date, sealed with their seals, and here in court to be produced, bound themselves unto said States, in the sum of seventeen thousand four hundred and ninety-four dollars and four cents, to be paid to said States by said defendants on demand: Yet, though requested, said defendants, or either of them, have not paid said sum, but owe and detain it, to the damage of the said plaintiffs, as they say, the sum of eighteen thousand dollars.

This action was entered at the present term:

And now the said Knight and others come and defend, when, &c., where, &c., and, reserving to themselves the right of giving any special matter in evidence, for plea, say, that the writing obligatory in

the plaintiff's declaration, set forth and declared upon, is not the deed of them, said defendants, and of this they put themselves on the country, by

FESSENDEN, DEBLOIS, AND KINSMAN,
Their Attorneys.

And the plaintiffs do the like.

JOSEPH HOWARD,
U. S. District Attorney.

And now the parties agree to the following statement of facts, viz: On the thirtieth day of January last past, the said Jacob and Benjamin were committed to the gaol in the city of Portland, on an execution issued on a judgment in favor of the said United States against said Jacob and Benjamin; whereupon the said Jacob and Benjamin as principals, and the said Isaac and Edward as sureties, gave the bond declared on in this suit; that Jacob and Benjamin continued to remain within the limits of the town of Portland, exclusive of the islands, and did not depart therefrom up to the time of the commencement of this suit, nor have they since departed therefrom; but neither the said Jacob *nor* Benjamin, from the time of the execution of said bond, nor afterwards at any time, lodged in the night time within the walls of said gaol, but remained at large within the limits of said town of Portland, exclusive of the islands belonging to the same, both day and night.

If, upon the foregoing facts, the court are of opinion that the condition of said bond has been broken by the said Jacob and Benjamin, and that they have made an escape, then the said court are to render judgment, to be entered as of said October term, and as on verdict rendered for the said United States; and if the court shall be of opinion that the obligation of said bond has not been broken, then judgment to be rendered in manner aforesaid for the said defendants.

And each party reserves to themselves the right to a writ of error, to reverse any such judgment as may, as aforesaid, be rendered by said court in the case.

Whereupon, after a full argument by the respective counsel, and due deliberation by the court had thereon, it appears to the court that "the obligation of said bond has not been broken;" and that, according to the agreement of the parties aforesaid, judgment must be rendered for the defendants:

It is therefore considered by the court here, that the said United States take nothing by their writ, and that the same be dismissed.

Recorded by JOHN MUSSEY, *Clerk.*

A true copy, as of record.
Attest: JOHN MUSSEY, *Clerk.*

433.

SUPREME COURT OF THE UNITED STATES.

No. 39.

PETER E. FREVALL, APPELLANT,

vs.

FRANKLIN BACHE, AD'R OF JOHN DABADIE & AL.

ON APPEAL FROM THE CIRCUIT COURT U. S. FOR WASHINGTON, D. C.

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Langtree & O'Sullivan, Print.

Style of Court.

DISTRICT OF COLUMBIA, *sct.*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of March, being the twenty-fifth day of the same month, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-third, were present

The Hon. WILLIAM CRANCH, *Chief Judge.*
BUCKNER THRUSTON and JAMES S. MORSELL, *Assistant Judges.*

ALEXANDER HUNTER, Esquire, *Marshal.*

WILLIAM BRENT, *Clerk.*

Parties.

In the record of the proceedings of the said court, among others, are the following, to wit:

PETER E. FREVALL
vs.
FRANKLIN BACHE, Ad'r of John Dabadie, The Hon. LEVI WOODBURY, Secretary of the Treasury, and JOHN CAMPBELL, Treasurer of the United States.

Be it remembered that heretofore, to wit, on the 13th day of June, A. D. 1836, the said complainant, by Richard S. Coxe, Esquire, his solicitor, filed in court here the following bill of complaint and exhibits, to wit:

Bill of Complaint.

To the honorable the judges of the circuit court of the District of Columbia, for the county of Washington, sitting in equity:

Humbly complaining, sheweth unto your honors, your orator, Peter E. Frevall, of the city of New-York, that, in the month of September, 1809, a certain Andrew Curcier, then a resident mer-

chant in the city of Philadelphia, was the owner of a certain schooner or vessel called the Spencer, and a valuable cargo on board her, consisting of cotton, coffee and indigo. That the said schooner, with her said cargo, sailed from Philadelphia, bound on a voyage to St. Sebastian, in Spain, where she safely arrived. That after her arrival, in the month of December, 1809, the said schooner with her cargo were illegally seized by the French authorities and sequestrated. That the losses sustained by the said illegal seizure and sequestration were very heavy, and, to the amount of them, the said Curcier had a valid claim against the French government for indemnification.

And your orator further shows that, in the course of business between the said Curcier and your orator, to wit, on the 25th day of January, 1827, the said Curcier assigned and transferred his interest in the said claim upon the French government, for compensation and indemnification for the illegal seizure and sequestration of the said schooner, the cotton of her cargo, and for the loss of her freight, to your orator, for the sum of fifteen thousand five hundred and sixty dollars, subject to the conditions therein contained, which your orator accepted and took, under the full belief and impression that the said claim was then a valid one, and bona fide the property of the said Curcier. And your orator produces to your honors a copy of the said assignment, which he prays may be taken as part of this his bill of complaint, the same being hereunto annexed as complainant's exhibit A.

And he further shows that the French government, by their treaty with the United States of July 4th, 1831, agreed to make and did provide an indemnity or compensation, to a certain extent, for the said and other wrongs and injuries sustained by citizens of the United States; and that, by virtue of the provisions of said treaty and of the act of Congress in such case provided, a board of commissioners was appointed, with authority to receive, examine and adjudicate upon such claims as might be presented under said treaty and act of Congress. And he further shews that, as such assignee of said Curcier, your orator did exhibit before the said board his memorial and claim for an allowance and indemnification for such illegal acts, and did exhibit his proofs in support of the same, and the said board did admit the said memorial and the sufficiency of the said proofs, and did award to your orator the sum of thirty-eight thousand and two hundred and eighty-eight dollars, for and on account of said losses and injuries, and did, in and by their said award, recognize and adjudge that your orator was the owner of eleven-seventeenth parts only of the said Curcier's interest in the said vessel and cargo.

And your orator further shews, that a certain Franklin Bache, claiming to be administrator of a certain John Dabadie, presented and exhibited before the said board a claim for the remaining five-sixteenth parts of said interest, and the said board admitted said claim, and made an award in his favor for the sum of seventeen thousand four hundred and three dollars, as the proprietor and owner of

said five-sixteenth parts, as aforesaid; which said sum, or so much thereof as may be payable out of the fund provided by said treaty, will be paid to said Bache, unless stopped and enjoined by the honorable court.

And your orator says that he has understood and believes that said claim of said Dabadie professes to be founded upon some assignment or transfer by said Curcier to him, at or about the time of the sailing of the said schooner on her aforesaid voyage, but your orator has never seen any such assignment or transfer, and he prays that said Bache, as administrator as aforesaid, may produce and exhibit before your honors such assignment or transfer, if any such there be, and that he may set forth and prove what was the original consideration of the same, and whether it was not a mere mortgage or hypothecation of such interest, and not an absolute and unconditional sale of the same. And your orator has understood and believes that, subsequent to such pretended assignment and transfer, the said Curcier always appeared to the world as the only and true owner of said schooner—that her papers were in his name as the such owner—that policies of insurance, both on her said voyage and subsequently, were in his name as the only owner,—that as such he transferred the interest which he appeared to have, to your orator as aforesaid, for a large and valuable consideration, and your orator paid said consideration and accepted said transfer for bona fide, without any notice or intimation of the said assignment to said Dabadie, if, in fact, any such ever existed.

And your orator further shows unto your honors, that, subsequent to the year 1810, there were various dealings and transactions in business between said Curcier and said Dabadie, which remained unsettled until some time in the year 1818; and that in the month of June, 1818, a settlement of all their concerns and interests took place between said parties, and that an account was made out and exhibited by said Curcier to said Dabadie, and a full renunciation of all claims of the latter upon the former; and all writings between them were relinquished and made null and void, with the exception only of what is therein contained; which said account and renunciation your orator has ready to produce when and where your honors may order, and a copy of which he prays, as exhibited herewith, and marked "Complainant's Exhibit B," may be taken as part of this his bill. And your orator shows, that, although he was neither party nor privy to such account and settlement, and only recently became informed of the same, he is entitled to use the same as proof of that, if the said Dabadie ever had any interest in the said schooner and her said cargo, whether the same was an absolute and unconditional one, or merely by way of pledge or hypothecation; whatever it was, it had ceased to exist, even as between the said parties, as early as the year 1818. And that the said Dabadie and his representatives had no valid, legal, or equitable claims, even as against the said Curcier, much less as against your orator, to any part or

portion of the said schooner or her cargo, or the proceeds thereof, or to the indemnity fund so provided as aforesaid, for the injuries and losses aforesaid. And your orator had well hoped that said Franklin Bache, administrator as aforesaid, would have recognized and admitted the validity of your orator's claim as aforesaid, and have suffered and permitted the whole amount of said indemnity to be awarded to him by the said board of commissioners.

But now, so it is, may it please your honors, that the said Bache has resisted and opposed the claim of your orator upon the most unfounded pretences; sometimes insisting that your orator had no claim whatever, as the assignee of said Curcier, although your orator has the valid transfer of said interest to the whole of said proceeds; sometimes insisting that your orator took such assignment, with full notice of the right and claim of said Dabadie, which your orator denies, and requires to be proved; sometimes pretending that the interest of said Curcier, to the extent of five-sixteenth parts of the same, was transferred to the said Dabadie, by way of security or mortgage for some pre-existing debt, which still remains due and unpaid; whereas your orator expressly charges that if the same were so made, which he does not in any manner admit, but requires to be fully proved, that said pre-existing debt has been long since paid and extinguished, and said Dabadie, or said Bache, as his administrator, has no remedy either in law or in equity to recover the same; sometimes he insists that the said assignment was full, absolute, and unconditional, and for an adequate and valuable consideration; all of which your orator denies, and requires full proof to be made thereof.

To the end, therefore, that the said Franklin Bache, administrator as aforesaid, may, upon his corporal oath, true, full, and perfect answer make to all and singular the premises, as fully as if the same were here again repeated, and he thereto specially interrogated; and that he may produce and exhibit the said assignment from said Curcier to said Dabadie, if any such there be, and shew the consideration for which the same was given; and whether and how the existence of the same was known to the public and to your orator, and that he may produce the original settlements between the said parties; and that he may be enjoined from receiving the proceeds of said award, or any part thereof, until the final or further order of this honorable court; and that the Honorable Levi Woodbury, Secretary of the Treasury, and John Campbell, Treasurer of the United States, and their respective successors, may be enjoined and prohibited from paying said money, or allowing, signing, or passing any certificate, scrip, warrant, draft, or other document relating thereto, until such further or final order; and that your orator may have such other and further relief as may be consistent with equity and justice. May it please your honors, the premises considered, to grant unto your orator the United States writ of injunction, to be directed to the said Franklin Bache, and to the said Levi Woodbury and John Camp-

bell, prohibiting and enjoining them as aforesaid; and also the United States writ of subpœna to them directed, commanding them to be and appear in this honorable court, true, full, and perfect answer to make as aforesaid, and to stand to, abide, and perform such further order and decree as to your honors may seem equitable and proper.

And inasmuch as the said Franklin Bache is not a resident of the District of Columbia, but resides in Philadelphia, in Pennnsylvania, may it please your honors to direct the usual order of publication, &c.

PETER E. FREVALL,
RICHARD S. COXE, *for complainant.*

Affidavit.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Be it remembered, that on the 31st day of May, Anno Domini 1836, personally appeared before the subscriber, judge of the United States, for the southern district of New York, Peter E. Frévall, the complainant, in the foregoing bill of complaint, who, being duly sworn according to law, doth depose and say that the averments and allegations in the said bill contained, so far as they relate to the acts and doings of the deponent, are true, and, so far as they relate to the acts and doings of others, he believes them to be true.

SAML. R. BETTS.

Exhibit A, Referred to in Bill of Compl't, page 3.

Memorandum of the arrangement between Peter E. Frevall and Andrew Curcier to terminate all outstanding accounts and claims between them, and of the conveyance and assignment by the said Andrew.

Peter E. Frevall releases Andrew Curcier from all accounts and claims due at this date, and he relinquishes every demand growing out of them. The sum now due is settled to be fifteen thousand five hundred and sixty dollars.

Andrew Curcier transfers and delivers over to Peter E. Frevall all his claim for indemnity upon the seizure by the French government of his cottons in the schooner Spencer, sequestrated at St. Sebastians. The cottons amounted to 129 square bales and 1560 pounds in bulk, making in all seventy-six thousand nine hundred and ninety-five pounds. Peter E. Frevall takes this claim as his own sole property, without account due to any body else.

Andrew Curcier also transfers and delivers over to Peter E. Frevall all his claim for indemnity upon the sequestration of the same schooner Spencer, David Maffett, captain, and for the loss of the

freight that ought to have been gained in that voyage; but Peter E. Frevall is to receive the indemnity for the value of the vessel and freight upon these conditions: He is to pay himself of his commissions and expenses; he is then to pay Mrs. Hortense Fausés the debt due her by Andrew Curcier, of seven thousand five hundred dollars, with all outstanding interests, and the debt due Mrs. E. Defrance, of eight thousand dollars, also with the outstanding interests. The balance remaining after these payments will belong to Peter E. Frévall, without account to any body.

Andrew Curcier is to furnish all the proofs and vouchers, and to do whatever acts may require his assistance for the establishment of the claims. If any of them fail through his refusing the proofs and vouchers, or his assistance when necessary, the damage will be at his charge. Made at the city of Philadelphia, on the 25th of January, 1827.

ANDREW CURCIER,
PETER E. FRÉVALL.

Witness,
M. E. ISRAEL.

Explanatory account of item of June 5, 1818, $3,800 80, *in foregoing account:*

Doit.

Mr. Andrew Curcier

à John Dabadie, comme suit,

Pour ma proportion des marchandises que j'aí achetées du Spencer, seconde voyage, montant à 41,218 francs à 37½ cents le franc, fait $15,456 75 au lieu de $15,961 94 q.	$504 82
Autant que je payai pour ma procurer de quoi payer la note de $1,500 quand il était à Baltimore . .	75 00
Erreur sur la goëlette Spencer	100 00
Une cais de vin Porté dans son compte et que je n'ai jamais reçu	7 50
Autant que Mad[e] Faurés doit de Solde, à ma societé cidevant Dabadie & Sharpnack	10 30
Autant a lui prété a differentes fois, suivant la compte detaillé que je lui a remis	402 00
Balance d'intérét porté dans mon compte courant avec lui du 20 Mai dernier et dont il me fait remise, montant à	2,701 18
Dollars	3,800 80

JN. DABADIE.

Philadelphia, 5 Juin, 1818.

EXHIBIT B, REFERRED

Dr. *Mr. John Dabadie in account*

		When due.	Days	Interest.	Sum.
1811		1811			
Mar. 20	To your interest in schooner Spencer's cargo, 2nd voyage . . .	June 3	2543	$2,119 16	$5,000 00
" "	To balance of money lent . .	Mar. 20	2618	569 73	1,305 73
May 9	To insurance on $5,000 on your account per schr. Spencer, from France to the U. States, a 17½ p. p. and policy $1	Aug. 6	2499	361 93	876 00
May 24	To your ⅛ of deficiency in schr. Spencer's cargo, 2d voyage, paid to I. L. Duval, $507 05, your pro. . . .	1812 Feb. 22	2281	60 24	158 45
Sept. 4	To one-fourth of invoice of dry goods, received per Spencer, 2d voyage, on account of the concern, and sold to I. L. Duval and yourself, amounting to fs. 170,260 72 at 37½ cents, $63,847 77, the fourth is	Feb. 22	2281	6,068 19	15,961 94
" 25	To two casks wine, at 60 dollars .	1811 Sept. 25	2429	48 58	120 00
" "	To two baskets, large bottles, oil, at $12	" "	2429	9 71	24 00
" "	To two ditto, small, do. at $9 50 .	" "	2429	7 69	19 00
1812 May 14	To two bags coffee, 210 lbs. at 20 cts.	" "	2429	17 00	42 00
" "	To two cases goods, sold you, amounting to fs. 14,502 47 at 37½ cents, $5,438 42	1812			
	Allowance, 438 42 . . .	Sept. 17	2070	1,725 83	5,000 00
" "	To one cask of claret . . .	May 14	2197	36 61	100 00
" "	To one do. white wine . .	" "	2197	16 47	45 00
Oct. 21	To 306 dozen chip hats, sold by you, on which you were to have half the profits, said chips having been delivered you 21st April, 1812; the amount of the sales is supposed to have been collected 21st October	Oct. 21	2037	2,493 28	7,344 00
1814 May 14	To one box white wine . . .	1814 May 14	1458	1 88	7 75
1816 Jan. 10	To one bag coffee . . .	1816 Jan. 10	861	5 81	40 50
Aug. 3	To S. Malsan's order on you . .	Aug. 3	655	12 11	111 00
" 17	To balance of nett proceeds of my note for $2,600, discounted by you for my account	" 17	641	7 72	72 27
Oct. 7	To one half-box sugar . . .	Oct. 7	590	4 89	49 77
1818 May 20	To interest calculated to this day .				2,701 18
				$13,566 83	
					$38,978 59

TO IN PAGE 5.

Current with Andrew Curcier.

		When due.	Days	Interest.	Sum.
1810		1810			
Nov. 10	By balance due you this day, $1,649 34, which I remitted you in a bill on England, which not being paid, the loss ought to be on your account . . .	Nov. 10	2748	$755 39	$1,649 34
" "	By H. Tournier's bill, protested, £1,003 16 Damages 20 p.c. 200 15 £1,204 11 Exchange 5 p.c. 60 4 £1,144 7 is $5,088 13				
	Deduct amount paid on your acc't to Page 1,500 00	" "	2748	1,643 36	3,588 13
1811					
Mar. 20	By your five-sixteenths of proceeds of Spencer's cargo, 1st voyage, $25.71.4.13 sold 16th November, 1810, at 6 months	1811 June 3	2543	3,403 77	8,035 65
" "	By your five-sixteenths of the hull of the schooner Spencer, which you have sold me for $2,000, on condition that no freight should be charged you on your interest in the cargo, 2nd voyage	" "	2543	847 66	2,000 00
Sept. 4	By your interest in proceeds of Spencer's cargo, 2d voyage, amounting, per account sales, to $71,693 46, the whole cost of said cargo being $54,077 43, and your interest being $5,000, sold 4th Sept. at 5 months . .	1812 Feb. 22	2281	2,520 83	6,628 77
Oct. 21	By your half of profits on 306 chip hats, sold by you . . .	Dec. 21	2037	886 38	2,610 84
1813					
June 12	By your five-sixteenths of amount recovered from Pœnix Insurance Company of New York for cotton, per schooner Spencer, sequestered at Bayonne, $7082.76 6-16 is . .	1813 June 2	1803	665 11	2,213 36
" "	By your proportion of the frs. 16,082 short remitted, of the proceeds of Spencer's cargo, 2d voyage, as per statement	1814 Nov. 1	2392	133 64	335 24
1817		1817			
Jan. 6	By cash	Jan. 6	499	8 31	100 00
May 20	By balance			2,701 18	11,817 26
				$13,566 83	
					$38,978 59

Dr. *Mr. John Dabadie in Account*

1818	To balance of account current rendered		$11,817 26
March 4	To one-half of 316 tierces of rice, shipped per the brig David Maffett, J. Avoux, master, at Savannah, bound for Havre de Grace, amounting, as per invoice, of which you have herewith a copy, *als* also, an order on Stephen Curcier, of Bordeaux, for the payment to you for one-half of the nett proceeds, to 11.	677,26	5,838 63
" 11	To one-half of the premium of insurance on the above mentioned invoice of rice, having been effected at Philadelphia on $11,677 26, amount of the invoice at 2½ p. p. and policy $1, $263 74,		131 87
April 7	To cash paid you,		1,200 00
" 13	To the following 3 bills of exchange, drawn by Aug. Lelievre to my order, at 60 days sight, dated New York, 6th April, 1818:		
	On Thurot & Co, of Havre, payable in Paris,		
	for 13,625 francs		
	On do. do. 19,999		
	On do. do. 20,000		
		53,625 at 5.30 f.	10,117 92
June 5	To your note, discounted at the Farmers and Mechanics Bank for your account, due 14|17 July next, and which I am to pay for,		1,500 00
			$30,605 68

1818			
March 4	By cash, ...		$2,000 00
" 16	By do.		600 00
" 24	By do. Missouri Post Note . .		700 00
April 7	By do.		1,200 00
May 7	By do.		500 00
" 23	By do.		2,000 00
June 5	By the following notes, which you have returned to me, viz:		
	1 dated 9 Jan., 1818, order of B. Sharpnack & Co.	$4,000	
	1 dated 9 Jan., 1818, order of B. Sharpnack & Co.	4,160	
	1 dated 24 Sept., 1817, order of B. Sharpnack & Co.	4,800	
	1 dated 26 Decem., your order	3,000	
			15,960 00
	By amount of your account rendered this day		3,800 80
	By balance due by Mr. John Dabadie		3,844 88
			$30,605 68

We do certify the above account to be just and true, amounting in debit as well as credit to the sum of thirty thousand six hundred and five dollars, sixty-eight cents, the balance whereof, in favor of Andrew Curcier, is three thousand eight hundred and forty-four dollars, eighty-eight cents, which John Dabadie acknowledges to be due by him to the said Andrew Curcier; the sum being in full for all demands for all concerns that have or may have existed between them at and from any time before the present date. The parties hereunto agreeing, in order to avoid any discussions henceforward, that neither of them shall, upon *no* pretext or cause, have the right to bring forward any claim or demand, of whatever kind it might be, against the other, considering themselves satisfactorily and fully discharged one towards the other, to this day, save the above balance due by the said John Dabadie to the said Andrew Curcier, as aforesaid; and declaring, moreover, that all writings that have passed between them are now null and void, excepting, however, *and* only a certain note, drawn by the said Andrew Curcier in favor of the said John Dabadie, for the sum of twenty-two thousand dollars, dated the first of January, 1817, at four years, and held by the said John Dabadie, bearing interest at the rate of six per cent. per annum; the interest on which note has been settled for up to the first day of July next; and which note, notwithstanding the present agreement, remains in full force and value. JN. DABADIE.

Philadelphia, 5th June, 1818.

Explanatory acc't of item of June 5, 1818, $3,800 80 *in foregoing account.*

Doit. Mr. Andrew Curcier,

à John Dabadie, comme suit.

Pour ma proportion des marchandises que jai achetés du Spencer, seconde voyage, montant à 41,218 francs à 37½ cents le franc fait $15,456 75 au lieu de $15,961 94 c. - - - - - - -	$504 82
Autant que se payai pour me procurer de quoi payer la note de $1,500 quand il etait à Baltimore, - -	75 00
Erreur sur la goelette Spencer, - - -	100 00
Une cais de vin, Porte dans son compte et que ja nâi jemais reçu -	7 50
Autant que Mad'e Faurés doit de Solde à ma societé cidevant Dabadie & Sharpnack, - - -	10 30
Autant a lui preté a differentes fois, suivant la compte detaillé que je lui a remis. - - - -	1102 00
Balance d'intérét porte dans mon compte courant avec liu du 20 Mai dernier et dont il me fait remise montant à - - - - - -	2701 18
	$3,800 80

PHILADELPHIA, Juin, 1818.
Jn. Dabadie.

Whereupon subpœna and injunction issued as prayed, returnable on the first Monday of July next.

At which mentioned first Monday of July, in the year of our Lord one thousand eight hundred and thirty-six, and the day of the return of the aforegoing subpœna, comes into court here, as well the said complainant, by his solicitor aforesaid, as the marshal of the District of Columbia, to whom the aforesaid subpœna was directed, and the said marshal makes return thereof, thus endorsed, to wit:

"Sum'd and enjoined the hon. Secretary and Treasurer. Non-suit the rest.

"A. HUNTER, *Marshal.*"

Thereupon the said cause was regularly continued at Rules until the first Monday of March, 1837, when Franklin Bache, administrator of John Dabadie, appeared by Francis S. Key, Esquire, his solicitor, who filed in court here the following answer and exhibits, to wit:

Answer of Dabadie, Administrator.

To the honorable the judges of the circuit court of the District of Columbia, for the county of Washington, as a court of equity now sitting. Plea and answer of Franklin Bache, administrator of John B. Dabadie, to the bill of complaint of Peter E. Frevall.

The said defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of said complainant alleged to be true, in such manner and form as the same are therein set forth, for plea thereunto saith, that by the treaty of July 4th, 1831, the French Government engaged to pay the sum of twenty millions of francs to the Government of the United States, with the stipulation, among others, to distribute it among those entitled, in the manner and according to the rules which it shall determine; and that, to carry into effect the provisions of said treaty, the United States by the act of July 13th, 1832, provided that three commissioners should be appointed and lawfully qualified, and sworn to perform the duties by said act required, &c., and were enjoined to receive and examine all claims coming under the provisions of the treaty, "according to the principles of justice, equity and the law of nations," and to report a list of their awards to the Secretary of State. And it was further provided by the said act, that the Secretary of the Treasury should receive from the Secretary of State a certified copy of said list, and should pay such monies as may have then been received into the Treasury, in virtue of the treaty, in rateable portions, among the persons in whose favour the awards shall have been made, and should issue certificates, shewing the proportion to which each may be entitled, of the amount that may thereafter be received; which certificates should entitle the legal holders of the same to be paid such

proportion of the nett proceeds of the several instalments, as the same shall be received from time to time from the French Government.

And the defendant further pleads and sets forth, by the provisions of said act the nett proceeds of the moneys received from the French Government, and paid into the Treasury, and such further sum set apart of moneys in the Treasury as may be equal to the reservation in favor of France, stipulated by the treaty, are "appropriated to satisfy the awards" therein provided for.

And the defendant further pleads and saith, that the commissioners appointed under the act above referred to, acting in conformity with the provisions thereof, and of the treaty which it was intended to carry into effect, did make an award to the defendant, as administrator of John B. Dabadie, of the sum of seventeen thousand four hundred and three dollars, as so much due to him as representative of said Dabadie, for loss of his interest in the vessel called the Spencer.

And the said defendant further pleads, that the award so made to the defendant is one of the awards, for the payment of which, or a rateable proportion thereof, the moneys above mentioned, so far as received into the Treasury, are appropriated by Congress, and as such, the payment of it, out of the moneys so appropriated, cannot be lawfully withheld; and that such award, being declaratory of the person to receive so much of the public treasure, appropriated in gross, cannot be annulled, either wholly or in part, or changed so as to be in favor of any person or persons, other than the one designated by the commissioners aforesaid; but that the same is a legal judgment of a competent tribunal, on a matter within its jurisdiction, and as such is final and conclusive, and cannot be re-examined or questioned, impugned, or impaired before this honorable court, or any other tribunal or authority whatever.

And therefore this defendant doth plead the said award so made by said commissioners, in bar to the said complainant's bill, and denies that this honorable court can take cognizance of the said cause; and he humbly prays the judgment of this court upon this his plea.

And the said defendant, relying on the matter above pleaded, and praying that the same may be considered and adjudged by your honors, further, by way of answer to the said bill, or so much thereof as he is advised it is material and proper for him to answer, he answers and says, that it is true, as stated in the said complainant's bill, that the vessel called the Spencer, with her cargo, as therein stated, did sail from the port of Philadelphia, on or about the first day of October, 1809, bound to the port of St. Sebastian, in Spain, and said vessel and said cargo arrived at said port, and were there illegally seized and sequestrated by the French authorities then in possession of said place.

And the defendant further saith, that a certain Andrew Curcier and the said Dabadie were the owners of said vessel and cargo, $\frac{11}{16}$*ths* thereof being the property of said Curcier, and $\frac{5}{16}$*ths* the property of said Dabadie; that the ownership of said Dabadie in the said $\frac{5}{16}$*ths* of said vessel and cargo was acknowledged by the said

Curcier in a note at the foot of a statement of the value of said vessel and cargo, signed by said Curcier, and dated the 10th of October, 1809, a copy whereof is herewith filed, marked exhibit F B No. 1, which defendant prays may be taken as a part of this his answer; and that the full consideration of $13,700 93 cents was paid by said Dabadie to the said Curcier, and also the sum of three thousand nine hundred and ninety-three dollars and thirty-five, for insurance thereon, as stated in an account current, signed also by the said Curcier, a copy of which is herewith filed, marked exhibit F B No. 2, which he also prays may be taken as a part of this his answer.

And your respondent, in corroboration of the bona fide nature of the purchase above set forth, submits to your honors a detailed statement of the insurance effected on his said interest, endorsed on exhibits F B No. 1, and two policies of insurance on said vessel and cargo, taken out in the name of said Dabadie, and marked F B 3.

And your respondent further alleges, that by the seizure and sequestration of said vessel, with her cargo, the said Dabadie sustained a loss of $\frac{5}{16}$*ths* of the value of the same, of which he was owner, and for which he had a valid claim against the French Government for indemnification; and your respondent denies that said Curcier had a valid claim to the whole of the property seized and sequestrated, as aforesaid.

And your respondent denies the validity of the assignment of said Curcier to the complainant, Peter E. Frevall, of his, the said Curcier's, pretended claim upon the French Government for compensation and indemnification for the illegal seizure and sequestration of the said vessel and the cotton of her cargo, and for the loss of her freight, so far as $\frac{5}{16}$*ths* of the same are concerned, said claim on the French Government in the said fractional amount belonging to said Dabadie, from the time of the loss to the period of his death, and subsequently to your respondent, as his representative, the said $\frac{5}{16}$*ths* of the property in question having been purchased from said Curcier by said Dabadie, before the loss incurred aforesaid, to wit, on or before the tenth day of October, 1809, as appears by respondent's exhibit F B No. 1, already referred to as forming part of this answer.

And your respondent answers, that the claim of said Dabadie, which he represents, as administrator, is founded upon the acknowledgment of said Curcier in said exhibit F B No. 1, given on the tenth of October, 1809, which is submitted to your honors as a part of this answer; and that the original consideration for the property which is the subject of respondent's claim was $17,694 28 cents, as set forth in the account current F B No. 2, already referred to, and which is verified by the signature of "Andrew Curcier, for himself and Stephen Curcier."

And your respondent states, that the interest which he claims in the aforesaid vessel, cargo, &c., was not a mortgage or hypothecation, but was an absolute right or interest therein, subject to no condition whatsoever, arising from a full and valuable consideration.

And your respondent further states, that he does not know how said Curcier appeared to the world in relation to the ownership of the said vessel and cargo, but refers your honors to the two policies of insurance, severally marked F B 3, already referred to in this answer, to show that such instruments were taken out by said Dabadie in his own name, and that therefore the fact of said Dabadie's interest might have been known; but were it otherwise, your respondent humbly apprehends that the alleged ignorance of the complainant of the previous transfer of part of the interest, for which he states he paid a valuable consideration, in no wise invalidates the rights of your respondent, as representative of said Dabadie.

And your respondent admits to your honors, that subsequently to the year 1810, there were various dealings and transactions in business between said Curcier and Dabadie, which remained unsettled until the month of June, 1818, when a settlement of all their accounts took place, by which they reciprocally agreed that they were "satisfactorily and fully discharged, one towards the other," save a balance, mentioned in the account, due by Dabadie to Curcier; and by which they declared that all writings that had passed between them were null and void, excepting only a note for twenty-two thousand dollars, drawn by said Curcier in favor of said Dabadie. This settlement is admitted by your respondent to have taken place, agreeably to the tenor of an account current, with its appended note of mutual discharge, signed by Andrew Curcier, which is in possession of your respondent, and a copy of which is herewith filed, marked F B 4, and offered to your honors as a part of his answer.

And your respondent denies that the interest of said Dabadie in the said vessel and cargo ceased to exist, or was transferred to said Curcier, or any other person, as a consequence of the settlement of June, 1818, (marked F B 4); but he admits that, since the loss of the portion of the said vessel and cargo constituting the interest of said Dabadie in the same, by reason of the seizure and sequestration by the French Government, neither he, the said Dabadie, nor your respondent had any valid, legal or equitable claim for the interest of said Dabadie, so lost, against said Curcier or the complainant, Frevall, nor have they ever pretended to have such claim; but they had, and have, such valid, legal and equitable claim for said loss, originally on the French Government, and subsequently, by treaty stipulations with France and the award of commissioners, on the Government of the United States.

And your respondent denies that the settlement of June, 1818, upon which the complainant seems to rest, has any bearing or influence upon the interest of the said Dabadie in the said vessel and cargo, it being plain that the stipulation in said settlement to make null and void all writings between Dabadie and Curcier, made previously to the date of the settlement, (with one exception,) was to render such writings invalid, as evidence of remaining debt between the parties, and not to destroy the evidence of property belonging to either party, out of which arises no claim between the parties, but a

claim upon third parties. Now your respondent avers, to the best of his knowledge and belief, that said Dabadie never made on said Curcier any demand or claim for his proportion of the loss caused by the French government on the said vessel and cargo, but considered his claim as upon the French government, until, by treaty stipulations with France, it was transferred as a debt due by the United States.

And your respondent denies the allegation that he has resisted the claim of the complainant upon any pretences whatever, much less upon unfounded pretences. He has not insisted that complainant has no claim as assignee of Andrew Curcier; but that he has no claim as assignee of said Curcier for $\frac{5}{16}$ths of the vessel, cotton, loss of freight, &c. He further avers, that he never insisted that the complainant took the assignment of said Curcier with full notice of the right and claim of said Dabadie, and therefore declines the requisition of complainant to prove said allegation. Whether the complainant did or did not know of the existence of the right and claim of said Dabadie, your respondent has no knowledge, and, further, deems the question as entirely unimportant, and not affecting his rights in the least degree. And your respondent further declares that he never asserted that the interest of said Curcier, to the extent of $\frac{5}{16}$th parts of the same, was transferred to the said Dabadie by way of security or mortgage for some pre-existing debt, which still remains due and unpaid, and denies that it was so, and asserts that it was an absolute interest subject to no condition whatever as herein before set forth. And your respondent avers that he does not know what debt is referred to in complainant's bill by the phrase, "and said pre-existing debt has been long since paid and extinguished," as he admits that, as representative of said Dabadie, he has no claim or demand against said Curcier or said complainant. And your respondent further declares that the interest of the said Dabadie, under which he claims from the United States, was full, absolute, and unconditional, and for an adequate and valuable consideration, for proof of which he again refers your honors to exhibits marked F B No. 1, and F B No. 2. And your respondent declares that the only settlements between Curcier and Dabadie known to him, are, 1st, the settlement of June 16, 1810, (marked F B No. 2,) 2d, the settlement of June 5, 1818, (marked F B 4,) and 3d, a settlement, dated October 14, 1826, which has not been previously mentioned in this answer, and is now herewith filed with the same, as respondent's exhibit F B No. 5, which he prays may be taken as a part of this answer.

And now, may it please your honours, your respondent has faithfully answered the several allegations of the complainants, and prays to add, that, in supporting his claim to indemnity before the commissioners, he took the ground as set forth in his memorial to the board, (hereunto annexed, F B 6,) which he prays to be received as part of his answer, that on or before the 10th of October, 1809, said Curcier transferred to said Dabadie the property which is claimed; that said Dabadie paid a valuable consideration therefor; that he never, by any acts, parted with the right to said property; that said property

was unlawfully taken from him by the unjust seizure and sequestration of the French government, the event which originated his claim on that government; that his claim continued in full force against said government to the date of the ratification of the late treaty with France, after which, the duty of satisfying the same was assumed by the United States. By this chain of evidence, supported and corroborated by the favourable award of the commissioners, your respondent trusts that he has established, to the complete satisfaction of your honors, his right to that portion of his claim for indemnity which has been awarded to him by said commissioners, and which is claimed adversely by the complainant.

And he denies all right or interest of said Frevall in the said $\frac{5}{16}$ths of said vessel and cargo, asserted in the said bill, as derived to him by any assignment from said Curcier, or in any other way, and that said Curcier had any right or interest in the said $\frac{5}{16}$ths which he could assign to said Frevall.

And the defendant denies all unlawful combination and confederacy in the said bill charged, without that, that any other matter or thing material or necessary for him to answer to, and not herein well and sufficiently answered to, confessed or avoided, traversed or denied, is true. All which matters and things he is ready to aver, maintain, and prove, as your honors shall direct, and prays to be hence dismissed, with his reasonable costs most wrongfully sustained, &c.

FRANKLIN BACHE,
F. S. KEY, *Sol'r for Def't.*

Affidavit of Def't.

CITY OF PHILADELPHIA, *sct.*

On this ninth day of March, A. D. 1837, appeared before me, the mayor of the said city, the defendant, Franklin Bache, named in the aforegoing answer, and made oath in due form that the matters and things contained and set forth in the said answer, so far as they are stated as of his own knowledge, are true as stated; and so far as they are stated as of the knowledge of others, he believes to be true.

In testimony whereof, I have hereto set my hand and official seal,
[SEAL] the day and year herein before mentioned.

JNO. SWIFT, *Mayor.*

Exhibit F. B. No. 1, *referred to, page* 19. [17.]

Statement of the cargo of schooner Spencer, captain Maffet, bound to St. Sebastians, or Passage.

A. C. 119 bales of New Orleans cotton, repacked at Philadelphia, w. 600,634 lb. *a* 17c.	-	-	10,205 78
10 bales Georgia upland cotton, w. 2,734 lb. *a* 12c.	-		328 08
1,560 lbs. do. do. do. in bulk, *a* 12 c.	-		187 10

24 seroons Guatemala indigo, w. 2,711 lb.		
Tare, - - 201		
2,440 lb. *a* 2 10c. -		5,124
7 boxes Bengal indigo, w. 1,923 lb.		
Tare, - 404 lb.		
1,519 lb. *a* 75c. - -		2,658 25
270 bags Java coffee, in bulk, w. 36,846 lb. *a* 20c. -		7,553 48
		$26,056 75

CHARGES.

Packing of cotton, pd. to Simmons, -	$777	
Porterage, - - - - -	50	
Permits, entr*ys* debentures, and proof of property, - - - - -	7 93	
Sundry affidavits and certificates of origin, -	3 80	
		839 73
		$26,896 52
First cost and disbursements of the Spencer,		16,946 49
		$43,843 01

Dabadie interest $\frac{5}{16}$ is $13,700 93¾.

Errors excepted.

AND'W CURCIER.

Philadelphia, 10th October, 1809.

Insurance effected on account of John Dabadie, on his interest in schooner Spencer and cargo.

5,000 *a* 22½ pr. c. - - -	$1,125	
Commission 1½ pr. c. - - -	25	
¼ of policy, - - -	25	
2,500 *a* 25 pr. c. - - -	625	
¼ of policy, - - -	25	
5,000 *a* 30 pr. c. - - -	1,500	
¼ of policy, - - -	25	
		$3,295 75

12,500

His $\frac{1}{16}$ on the amount insured.

$20,000	insured at New York, -	$4,601	
10,000	Do. at Philadelphia, by Pennsylvania office, - - -	2,001	
5,000	Do. do. by Union office, -	1,251	
5,000	Do. do. Delaware do. -	1,251	
7,500	Do. do. private underwriter, -	2,378	
47,500		11,42 1/16	717 60
			$3,993 35

Recorded in the chancery of the consulate of the United States at Bordeaux, at the request of Mr. Albert Dabadie, the 4th day of August, 1832.

G. STROBEL, *U. S. Consul.*

Register I, fol. 130.

Account current referred to in page 20. [17.]

John Dabadie son compte courant avec Andrew & Stephen Curcier.

	DR.	
1808. Decembre 8.	Pour argent á vous payé ce jour, -	$2,000 00
1810. Janvier 21.	Intérests depuis le 8 Decembre jusqu'a ce jour, - - - - -	269 00
	Pour vos 5-16 interest sur la goelette Spencer et son chargement, - -	13,700 93
	Pour assurance sur la goelette et chargement, - - - -	3,993 35
	Pour argent payé à Malsan et femmes de mattelots ensemble $254 vos 5-16, -	79 43
	Pour autant que vous me deves, - -	20 00
	do. do. à vous prété, - -	10 00
	Pour 2 barriques de vin, - - -	90 00
	Pour votre 5me dans un pari, - -	41 00
	Pour autant payé par Mme. Faurés en deux fois, - - - - -	13 50
	Votre $\frac{1}{2}$ d'intéret dans le chargement de payant, - - - -	776 16
	Balance due John Dabadie, - -	7,033 00
		$28,023 34

	CR.	
1808. Juillet 21.	Pour nos billets dus ce jour, - -	$10,648 89
1810. Janvier 21.	Intérets depuis le 21 Juillet jusqu'a ce jour,	1,916 79
	Pour autant reçu a compte de vos 5-16 dans cargaison et batiment de la goelette Spencer, - - - - - -	12,083 07
May 31.	Intérets sur $4,606 07 depuis le 21 Janvier jusqu'a ce jour, - - -	184 00
	Pour intérets sur $2,000, 112 jours, -	56 00
	Pour pari Dolivur & Allen, - -	540 00
	Pour compte de Stephen Curcier, -	34 20
	Pour compte de Madame Faurés, -	33 65
	Pour caffé vendu d'après compte intérets,	2,430 00
	Pour différence dans l'intéret, - -	96 74
		$28,023 34

Arreté ce jour le present compte, par le quel il revient au sieur John Dabadie une balance de $7,030, la quelle une fois payée declarons être finale et générale de tous comptes entre nous ayant généralement tout compté dans ce dit compte courant, déclarons egalement annuller et annullons par ces presentes tous papiers comme checks, billets ou reçus, qui pouront se trouver par oubli, ou egarés, à la possession, ou prejudice de l'un ou de l'autre, les regardant comme objets non avenir, ayant tout reglé par le present compte, declarons egalement le payement de la dite balance fait nous donner mutuellement décharge depuis le commencement du monde jusqu'a ce jour. Fait double et de bonne foi à Philadelphie, ce 16 Juin, 1810.

(Signed) ANDREW CURCIER,
For himself and Stephen Curcier.

Recorded in the chancery of the consulate of the United States, at Bordeaux, at the request of Mr. Albert Dabadie, 6th August, 1832.
G. STROBEL, *U. S. Consul.*

Register I, fol. 135.

EXHIBIT F. B. 3.

Policies of Insurance referred to in page 20. [17.]

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA.
No. 11269.

This policy of insurance, indented, made by and between the Insurance Company of the State of Pennsylvania, assurers, of the one part, and John Dabadie, as well in his own name, as for and in the name and names of all and every other person or persons to whom the property hereby insured doth, may or shall appertain, in part or in the whole, assured, of the other part, Witnesseth, that the said insurance company have made insurance, and by these presents do cause the said John Dabadie and every of them to be iusured in the sum of ten thousand dollars, lost or not lost, at and from Philadelphia to St. Sebastian or Port Passage, if turned off to proceed to another port, upon the body, tackle, apparel, and other furniture of the good schooner called the Spencer, of the burthen of tons, or thereabouts, whereof is master, for the present voyage, Maffat, or whosoever else shall go for master in the said vessel, or by whatsoever other name or names the said vessel, or master thereof, is or shall be named or called, beginning the adventure upon the said vessel, tackle, apparel, &c. at and from Philadelphia aforesaid, and so shall continue and endure untill the said vessel shall be safely arrived at as aforesaid, and untill she be moored twenty and four hours in good safety.

And it shall and may be lawful for the said vessel in her voyage to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance, the said vessel, tackle, &c.,

for so much as concerns the assured, by agreement made between the assured and assurers for the same. Touching the adventures and perils which the assurers are contented to bear and take upon them in this voyage, they are by the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart, and counter mart, surprisals, takings at sea, arrest, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes which have or shall come to the hurt, detriment or damage of the said vessel, or part thereof. And in case of any loss or misfortune, it shall be lawful to and for the assured, his factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said vessel, or any part thereof, without prejudice to this insurance, to the charges whereof the assurers will contribute according to the rate and quantity of the sum herein insured. And it is agreed by the assurers that the writing or policy of insurance shall be of as much force and effect as the present writing or policy of assurance heretofore made in any of the United States of America, or elsewhere. And so the assurers are contented, and do hereby bind themselves and their successors to the assured, his executors, administrators and assigns, for the true performance of the premises, confessing themselves paid the consideration due them for the assurance for the said sum of ten thousand dollars, by the said assured, or his assigns, after the rate of twenty per cent.; and in case of loss, the assured is to abate two per cent., such loss to be paid in thirty days after the proof and adjustment thereof; the amount of the note given for the premium, if unpaid, being first deducted: Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then the said Insurance Company of the State of Pennsylvania shall be answerable only for so much as the amount of such prior assurance may be deficient towards full covering the premises hereby assured, such amount being understood to be the whole sum underwritten, without any deduction for the insolvency of all or any of the underwriters: and that this policy, so far as the property has been previously insured, shall be considered as null and void to all intents and purposes. And the said Insurance Company of the State of Pennsylvania shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. And that in case of any insurance upon the said premises, subsequent in date to this policy, the said Insurance Company of the State of Pennsylvania shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. In witness whereof the said Insurance Company of the State of Pennsylvania have caused their common seal to be affixed to these presents, in Phila-

delphia, the twenty-first day of November, one thousand eight hundred and nine.

MEMORANDA.

1. It is agreed, by and between the assured and assurers, that no loss shall be paid on any average under five per cent., unless the said average be general.

2. It is further agreed, that if any dispute shall arise relating to a loss on this policy, it shall be referred to two persons, one to be chosen by the assured and the other by the assurers, which two persons shall have power to adjust the same; but, in case they cannot agree, then those persons shall choose a third, and any two of them agreeing, their determination shall be obligatory on both parties.

3. If the above vessel, after a regular survey, should be condemned for being unsound or rotten, the assurers shall not be bound to pay their subscriptions on this policy.

4. It is also agreed, between the assured and assurers, that in all cases of return premium, one-half per cent. upon the sum insured shall be retained by the assurers.

5. It is mutually agreed by the parties to this policy, that no part of the premium shall be returned or abated, on account of any deviation which shall be made by the owners, or their factors, from the present voyage.

6. It is warranted by the assured free from any damage or loss which may arise in consequence of seizure or detention of the property, for or on account of illicit or prohibited trade; and in case of capture or detention, the assured renounce all claims against the assurers, for demurrage, seaman's wages, and provisions.

This insurance is against all lawful risks, seizure in port excepted. Warranted American property to prove here only. In case of capture or detention, and the above vessel shall be liberated within sixty days after advice being received here of such capture or detention, no abandonment shall be offered.

By the company :

JAMES S. COX, *President.*

Exhibit F B 3, *referred to in page* 23. [17.]

Exhibit F B 3, referred to in page 20.

Whereas John Dabadie, as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all, doth make assurance, and cause himself two thousand dollars, and them, and every of them, to be insured, lost or not lost, at and from Philadelphia to St. Sebastian, or Passage, upon all kinds of lawful goods and merchandises, loaden or to be loaden aboard the good schooner called the Spencer, whereof is master for this present voyage D. Moffat,

or whosoever else shall go for master in the said vessel, or by whatsoever other name or names the said vessel, or the master thereof, is or shall be named or called; beginning the adventure upon the said lawful goods and merchandises from and immediately following the loading thereof on board the said schooner at Philadelphia aforesaid; and so shall continue and endure until the said goods and merchandises shall be *fals*ely landed at St. Sebastians, or passage aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. Touching the adventures and perils which we, the assurers, are contented to bear and to take upon us in this voyage, they are, of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, taking at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the master and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detainment or damage of the said goods or merchandises, or any part thereof. And in case of any loss or misfortunes, it shall be lawful to and for the assured, his factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; to the charges whereof, we, the assurers, will contribute, each one according to the rate and quantity of his sum herein insured. And it is agreed by us, the assurers, that this writing or policy of insurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in any of the United States, or elsewhere. And so we, the assurers, are contented, and do promise and bind ourselves, each one for his own part, our heirs, executors and goods, to the assured, his executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the con*stitut*ion due unto us for the assurance, by the said assured, or his assigns, at and after the rate of thirty per cent. And in case of loss, the assured is to abate two per cent., and such loss to be paid in one month after proof thereof. Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid prior in date to this policy, then the assurers shall be answerable in proportion to the sums respectively subscribed, and not one for the other, only for so much as the amount of such prior assurance may be deficient, towards fully covering the premises hereby assured, such amount being understood to be the whole sum underwritten, without any deduction for the insolvency for all or any of the underwriters; and that this policy, so far as the property has been previously insured, shall be considered as null and void, to all intents and purposes. And the said assurers shall return the premium upon so much of the sum by them individually subscribed hereto, and not one for the other, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to

retain the premium by them received, in the same manner as if no such subsequent assurance had been made. And it is agreed, that if any dispute should arise relating to the loss on this policy, it shall be referred to two indifferent persons, one to be chosen by the assured, the other by the assurer or assurers, who shall have full power to adjust the same; but in case they cannot agree, then such two persons shall choose a third, and any two of them agreeing shall be obligatory to both parties.

In witness whereof, we, the assurers, have subscribed our names, and sums assured, in Philadelphia, the eighth day of February, one thousand eight hundred and ten.

Memorandum. It is agreed, that salt, wheat, Indian corn, pease, or any other kind of grain, malt, bread, and dried fish, stowed in bulk, tobacco in casks, fruit, apples, or any other articles that are perishable in their own nature, are warranted free from average, unless general. All other goods free from average, under five per cent., unless general.

The assured shall allow the office keeper or broker half per cent., for his trouble in collecting any loss that may happen on this policy, paying the same in due time, and registering it in the office books. And in all cases of return premium, five per cent. on said premium to be retained, that in no case it be under an half per cent. on the sum subscribed.

It is mutually agreed by the parties to this policy, that no part of the premium shall be returned or abated, on account of any deviation which shall be made by the owners, or their factors, from the present voyage.

Warranted free from any charge, damage, or loss which may arise in consequence of a seizure or detention of the property for, or on account of illicit or prohibited trade.

Warranted American property, proof to be made in Pennsylvania only, also that in case of capture, no abandonment shall be made until sixty days after receiving advice thereof, unless previously condemned.

H. FOURNIER.

Recorded in the chancery of the consulate of the United States at Bourdeaux, at the request of Mr. Albert Dabadie, the 6th August, 1832.

G. STROBEL, *U. S. Consul.*

Register I. F. 133.

On the back of the foregoing policy was endorsed, in the words following, to wit:

" Policy, Feb'y 8th, 1810. Schooner Spencer, Maffet, Master, St. Sebastian or Passage from Philadelphia.

JOHN DABADIE.

$2000, Goods at 30 per cent.,	600
Policy,	1
	601

Exhibit F B. No. 4. Referred to in page 22. [18.]

Dr. *Mr. John Dabadie in account*

1818.	To balance of account ct. rendered,		$11,817 26
March 4.	To one half of 316 tierces of rice, shipped per the brig David Moffit, Davoux, master, at Savannah, for Havre de Grace, amounting, as per invoice, (of which you have herewith a copy, as also an order on Stephen Curser of Bordeaux, for the payment to you of one half of the nett proceeds, to $11,677 26,		5,838 63
11.	To one half of the premium of insurance on the above mentioned rice, having been effected at Philadelphia, on $11,677 26 amount of the invoice at 2¼ pr. c., policy, $1.	$263 74	131 87
April 7.	To cash paid you, - - - - -		1,200 00
" 13.	To the following 3 bills of exchange drawn by Aug. Lelièrres to my order, at 60 days sight, dated New York, 6th April 1818.	On Thurst & Co., Havre, p'y'ble in Paris, for 13,625 fr. do. do. 19,900 do. do. 20,000 53,625 at 5,30	10,117 92
June 5.	To your note discounted at the Farmer's and Mechanic's Bank, for your account due 14|17 July next, which I am to pay for, - - - - - - -		1,500 00
		Dollars,	30,605 68

Current with Andrew Curcier. Cr.

1818.		
March 4.	By cash, - - - - - -	$2,000 00
" 16.	By do. - - - - - -	600 00
" 24.	By do. Missouri post-note, - -	700 00
April 7.	By do. " " - -	1,200 00
May 7.	By do. " " - -	500 00
" 23.	By do. - - - - - -	2,000 00
June 5.	By the following notes which you have returned to me, viz:	
	1 dated 9 Jan'y, 1818, order of B. Sharpnack & Co., - - - - -	$4,000 00
	1 dated 9 Jan'y, 1818, do. do.	4,160 00
	1 " 22 Sept., 1817, do. do.	4,800 00
	1 " 26 Dec'r, your order, - -	3,000 00
		15,960 00
	By amount of your account rendered this day, - - - - - -	$3,800 00
	By balance due by Mr. John Dabadie,	3,844 88
	Dollars,	30,605 68

We do certify the above account to be just and true, amounting in debit as well as credits to the sum of thirty thousand six hundred and five dollars sixty-eight cents, the balance whereof, in favor of Andrew Curcier, is three thousand eight hundred and forty-four dollars eighty-eight cents, which John Dabadie acknowledges to be due by him to the said Andrew Curcier, the same being in full of all demands for all concerns that have or may have existed between them at and from any time before to the present day, the parties hereunto agreeing, to avoid every discussion henceforward, that neither of them shall, upon no pretext or cause, have the right to bring forward any claim or demand, of whatever kind it might be, against the other, considering themselves satisfactorily and fully discharged one towards the other to this day, save the above balance due by the said John Dabadie to the said Andrew Curcier as aforesaid, and declaring that all writings that have passed between them are now null and void, excepting however, and only, a certain note drawn by the said Andrew Curcier, in favor of the said John Dabadie, for the sum of twenty-two thousand dollars, dated the first of January, 1817, at four years, and held by the said John Dabadie, bearing interest at the rate of six per cent. per annum; the interest of which note has been settled for up to the first day of July next, and which note, notwithstanding this present agreement, remains in full force and value.

Philadelphia, 5th June, 1818.

(Signed.) ANDREW CURCIER.

On which account was endorsed as follows, viz:

The balance of $3,844 88, stated in the foregoing account, has been settled and cancelled by agreement made the 14th October, 1826, by A. Curcier, on his own part, and as attorney for Stephen Curcier, and by Franklin Bache, attorney in fact of J. Dabadie.

ANDREW CURCIER.

Witness,
W. J. DUANE.

FREVALL *vs.* BACHE. } Circuit Court of the District of Columbia for the County of Washington.

It is agreed that the name, Andrew Curcier, above written, is the proper hand-writing of Andrew Curcier, the assigner under whom the plaintiff above named claims.

EDW'D D. INGRAHAM, *for Fravall,*
JAS. BAYARD, *for F. Bache.*

Agreement ref'd to page 25. [19].

Agreement to adjust referred to page 25.

This agreement, made the fourteenth day of October, in the year eighteen hundred and twenty-six, witnesseth,

1. It is agreed that the said Andrew Curcier vs. John Dabadie, No. 86, March Term, 1824, in the district court of Philadelphia, be forthwith discontinued, the plaintiff paying the costs therein.

2. It is agreed that the suit, John Dabadie vs. Andrew Curcier, No 275, June Term, 1825, in the district court aforesaid, be forthwith discontinued, plaintiff paying the costs therein.

3. It is agreed that the sum of five thousand dollars, attached to the first mentioned suit, and subsequently invested in the names of W. J. Duane, Henry Chester, and Franklin Bache, with the interest that has accrued thereon, shall be forthwith put at the disposal of Franklin Bache, attorney in fact of John Dabadie.

4. It is agreed that John Dabadie, by his attorney aforesaid, shall assign to such person as Andrew Curcier shall name, any claims that he has against Stephen Curcier, or Stephen Curcier's estate, arising out of John Dabadie's interest in the first and second voyages of the Spencer, and of a shipment of rice made in February, 1818, by R. S. Dutrumil per brig David Maffet, Davaux, master, to Thuret and Co., Havre.

5. It is agreed that John Dabadie's draft on Andrew Curcier, in favor of A. de Francis, for $734, dated January 25, 1819, and accepted by A. Curcier, April 6, 1819, shall be delivered to A. Curcier.

6. It is agreed, that in consideration of the premises, this instrument is to be considered and held as a release, on the part of John Dabadie, of all claims on his part against Andrew Curcier and Stephen Curcier, and of all claims on the part of Andrew Curcier and Stephen Curcier, severally or jointly, against John Dabadie; this not to affect the assignment stipulated in Article 4.

7. It is agreed, that out of the five thousand dollars, with the interest mentioned in the third article, Franklin Bache, attorney of John Dabadie, shall retain one thousand dollars until he shall get from John Dabadie and give to A. Curcier the acknowledgment of Laboissiere that he was indebted to A. Curcier, which acknowledgment A. Curcier gave to J. Dabadie, in June, 1818; *or*, until he shall pay to A. Curcier the monies received by John Dabadie from Laboissiere, on account of A. Curcier, if any he received; *or*, until, in case no money was received, or the said acknowledgment be lost, an affidavit of John Dabadie, stating the fact, shall be got and delivered to A. Curcier; or, in case of the death of John Dabadie, until the executors of John Dabadie shall transmit to Franklin Bache, and he shall present to A. Curcier, the affidavit of said executor, that the said acknowledgment is not to be found, and is lost; and that John Dabadie received no monies from Laboissiere on account of A. Curcier.

In testimony whereof the several parties have set their hands and seals hereto, the day and year first above written.

ANDW. CURCIER, (Seal.)
ANDW. CURCIER, (Seal.)
Attorney in fact for S. Curcier.
FRANKLIN BACHE, (Seal.)
Attorney in fact for J. Dabadie.

Witnesses:
R. Renshaw, Junr.
G. Strobel.
H. J. Duvrey.

Frevall vs. Bache. } Circuit Court for the District of Columbia, for the County of Washington.

It is agreed that the foregoing instrument or article of agreement was duly signed by the parties, whose name are thereto subscribed as parties.

EDW. D. INGRAHAM,
for Frevall.
JAS. BAYARD,
For F. Bache.

24th December, 1838.

Exhibit F B No. 6. Referred to page 25. [19.]

Copy of a memorial from F. Bache to French Commissioners.

To the Honorable, the Board of Commissioners appointed under the act of Congress, passed on the 13th day of July, 1832, to carry into effect the Convention between the United States of America and his Majesty the King of the French, concluded at Paris, on the 4th July, 1831.

The memorial of Franklin Bache of the city of Philadelphia, Physician, Administrator with the will annexed of John B. Dabadie, deceased,
Respectfully represents:

That your memorialist is a native citizen of the United States of America, domiciled in Philadelphia; that the said John Dabadie was for many years dimiciled at Philadelphia, and was naturalized at Philadelphia, on the 30th June, 1797, and died in France in the year 1832.

That your memorialist has a claim under the said Convention, in right of the said John B. Dabadie, who was owner of five-sixteenths of the schooner Spencer and cargo, which were seized by the French Government, and confiscated in the year 1809.

The schooner Spencer, David Maffet, master, sailed from the port of Philadelphia about September 1809, for the port of St. Sebastian, or Passage, in Spain, with a cargo of cotton, indigo, and coffee; shipped by Andrew Curcier, and consigned to Stephen Curcier, supercargo. Said schooner arrived at St. Sebastian in the month of November, 1809, and delivered her cargo in good order. She was ordered to Passages, a few miles from St. Sebastian's, as a safer harbor in the winter season. In the latter part of December, an order was received by the French authority to sequester all American vessels and property at St. Sebastian and Passage. The authorities sent soldiers who took possession of the American vessels at Passage, the Spencer included, and unhung the rudders and carried the sails on shore. The Spencer remained at Passage until the summer of 1810, when she was given up, and transferred to Stephen Curcier, supercargo on board, on condition of taking to the United States a French Chargé d'Affaires, and a bearer of despatches, with as many American Captains, Mates, & Seamen, as she could accommodate, which condition the supercargo complied with, and landed them in New York, in November. The cargo was taken by the French government and confiscated. The said cargo consisted of one hundred and twenty-nine bales, and 1,560 pounds cotton, thirty-one boxes indigo, and three hundred and twenty bags of Java coffee.

That the ownership of the said John B. Dabadie, of five-sixteenths of the said vessel and cargo, originated before the 10th October, 1809, as appears by a document of that date, in the possession of your memorialist & signed by said Andrew Curcier, also containing

an exact statement of the cost of said schooner and cargo, by which the said Curcier acknowledged the said Dabadie to be the owner of the said five-sixteenths, the total costs and charges of said schooner and cargo, being without insurance, $43,843 61, and said Dabadie's five-sixteenths, being thirteen thousand seven hundred dollars and ninety three cents and three-fourths, as will appear by the same, and the said J. B. Dabadie paid to the said Andrew Curcier the said sum of thirteen thousand seven hundred dollars and ninety-three cents and three-fourths, as well as the further sum of three thousand nine hundred and ninety-three dollars and thirty-five cents, for insurance, a total sum of seventeen thousand six hundred and ninety-four dollars and twenty-eight cents, as the price or purchase money of the said five-sixteenths of said schooner and cargo, and insurances thereon, partly before and partly after the sailing of said schooner, as appears by an account stated between said Andrew and Stephen Curcier, and said J. B. Dabadie, dated 16th June, 1810, in the possession of your memorialist.

Your memorialist therefore claims a compensation for said loss, amounting to the said sum of seventeen thousand six hundred and ninety-four dollars and twenty-eight cents, together with the loss of freight of said schooner Spencer, the usual charges for commission, &c., and interest from the said 10th October, eighteen hundred and nine, or whatever further sum or sums he may be justly and legally entitled to according to the principles acted on by your honorable board.

Your memorialist further states, that the entire amount of said claim did, at the time when the said claim had its origin, belong solely and absolutely to the said J. B. Dabadie, and does now belong solely and absolutely to the said administrator or his representative, and that no other person has any right or interest therein by transfer or otherwise; that neither the said J. B. Dabadie nor this claimant have ever received any sum of money, or other equivalent, as indemnification for the whole or any part of said loss.

In support of his said claim, your memorialist begs to refer to the following documents in his possession, ready to be forwarded, viz:

1. Statement of the cargo and costs, &c. of schooner, and of Mr. Dabadie's interest in 5-16 thereof, dated at Philadelphia, 10 October, 1809, and signed by Andrew Curcier.
2. Accounts stated between A. & S. Curcier and Dabadie, dated sixteenth June, 1810, signed A. Curcier for A. & S. Curcier.
3. Policies of insurance on goods and vessels on the outward voyage, in name of Dabadie and others interested.
4. Certificate of naturilization of J. B. Dabadie.
5. Letters of administration to your memorialist.

He further craves leave to refer to the memorials before your board, with the documents and vouchers therein referred to, of

1. David Maffet, captain of schooner Spencer.
2. Peter Freval, assignee of A. Curcier.

3. Hierome Bonnet, who claims the indigo and coffee, under A. Curcier.

[Here follow the statement of the cargo of the schooner Spencer, as given in Exhibit F B No. 1; the list of insurance effected for account of J. Dabadie, endorsed on said exhibit, and the affidavit of F. Bache, as administrator, to the truth of the facts, which closes the memorial F B 7.]

And the said defendant also, by his solicitor aforesaid, moved that the said injunction be dissolved. Whereupon the said bill, answers, and exhibits being seen, heard, and read by the court, and the parties by their solicitors being heard, and the matter being fully understood, it is ordered by the court here, that the said injunction be dissolved.

Thereupon, on motion of the said defendants, by their solicitor aforesaid, it is ruled by the court here, that the said complainant enter a general replication to the answers aforesaid of the said defendants; or, in default thereof, that the said bill be dismissed.

Thereupon, the said cause was regularly continued at rules until the first Monday in May next, when the said complainant, by his solicitor aforesaid, filed in court here the following general replication, to wit:

General Replication.

FREVALL, *vs.* BACHE, Ad'r of Dabadie. } Equity—General Replication.

The replication of Peter E. Frevall, complainant, to the answer of Franklin Bache, administrator of John Dabadie, defendant.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, full, and sufficient in law to be answered unto, and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without that. That any other matter or doing whatsoever, in said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is, and will be, ready to aver and prove as this honorable court shall direct, and humbly prays, &c. as in and by his said bill he hath already prayed.

COXE & CARLISLE,
Plaintiff's Solicitors, &c.

5th May, 1837.

Cause set for hearing.

Thereupon, the said cause was regularly continued at rules until

the fourth Monday of March, 1838; whereupon, with the consent of the parties aforesaid, by their solicitors aforesaid, and by order of the court here thereon, the said cause is set for hearing on the bill, answers, exhibits, general replication, and depositions by complainants; and the said cause was further continued until the first Monday of June next, when the complainant and defendant, by their solicitor aforesaid, filed the following agreement to take testimony, to wit:

C.

Agreement to take testimony.

PETER G. FREVALL, *vs.* FRANKLLIN BACHE, Adm'r of John Dabadie.	Circuit Court of the District of Columbia, for the county of Washington. In equity.

It is agreed by and between the parties in this case that the testimony of witnesses may be taken in such form and upon such notice, as may be agreed upon between Edward D. Ingraham, Esq., counsel for complainant, and James Bayard, Esq., counsel for defendant, and upon such interrogatories and cross-interrogatories as may be agreed upon between the above-named gentlemen.

And it is agreed that the depositions of any competent witnesses, taken as aforesaid, whether in the United States or elsewhere, shall be read in evidence in this case on the hearing thereof.

RICH. S. COXE, *for comp't.*
F. S. KEY, *for defendant.*

June 27th, 1838.

Thereupon the said cause was regularly continued at rules until the first Monday of March, 1839, when the complainant and defendant, under the agreement aforesaid, filed the following depositions, to wit:

Depositions.

Depositions of witnesses, produced, sworn and examined, on the twenty-fifth day of September, in the year of our Lord one thousand eight hnndred and thirty-eight, at the house of D. C. Croxall, Consul of the United States of America at Marsailles, in France, by virtue of an agreement in the nature of a commission, issuing from the circuit court of the district of Columbia, for the county of Washington, to me directed, for the examination of witnesses in a certain cause depending in said court, wherein Peter G. Frevall is plaintiff, and Franklin Bache, executor of John Dabadie, is defendant.

Honoré Francis Fournier, of the city of Marsailles, aged sixty-seven years, being produced and sworn and examined on behalf of the plaintiff, deposeth as follows:

1st. To the first interrogatory on the part of the plaintiff, he answers as follows: He knows the said parties, complainant and defendant; knew them during many years in Philadelphia.

2. To the second interrogatory on the part of the plaintiff, he answers as follows: He was present at a settlement, in June, eighteen hundred and eighteen, between Andrew Curcier and John Dabadie, since deceased, in Philadelphia.

3. To the third interrogatory on the part of the plaintiff, he answers as follows: The settlement between said Curcier and Dabadie was brought about and effected by him (the said witness) as umpire, or mediator, between them, the said parties.

4. To the fourth interrogatory on the part of the plaintiff, he answers: The interest or ownership of the schooner Spencer, both hull and cargo, in the first voyage in October, 1809, from Philadelphia to St. Sebastian in Spain, was one of the matters settled, on the occasion already mentioned, between them; that the claim on the French government for indemnity for the sequestration of said schooner Spencer should belong to the said Andrew Courcier.

5. To the fifth interrogatory on the part of the plaintiff, he answers as follows: The said Dabadie did urge on the said Curcier the propriety of said Curcier's receiving again and retaining the ownership of said schooner Spencer, and of her cargo, for the said first voyage, and of the claim on the French government for said indemnity, because he (said Curcier) had always assured said Dabadie that he should never lose by having held the same as a security.

6. To the sixth interrogatory on the part of the plaintiff, he answers as follows: There was many allowances made to said Dabadie by said Curcier upon the settlement made as aforesaid, besides giving said Dabadie credit for the amount of said schooner Spencer and her cargo, on account; and he (the said witness) remembers that said Dabadie was not to be debited by said Curcier of his part of the expenses incurred in St. Sebastian in Spain, and in France, in the endeavours made to recover said schooner Spencer and her cargo; and the said Dabadie was contra-credited by said Courcier of the balance due by said Dabadie on the account of interest, amounting to nearly three thousand dollars, (3000) to the best of witness's recollection. And when said Courcier sent said schooner Spencer on a second voyage, from New-York to Bayonne in France, he gave an interest of five thousand dollars, freight free, to the said Dabadie, and also other allowances, which said witness cannot now specify or enumerate, but he believes will appear in the written settlement made in Philadelphia in June, 1818, and signed by the said Courcier and Dabadie.

Signed before me.
D. C. CROXALL, *Commissioner.*

H. FORMIRE.

Testimony of H. Formire.

1st. To the first cross-interrogatory on the part of the defendant, he answers: He is sixty-seven years old.

2. To the second cross-interrogatory on the part of the defendant, he answers as follows: He went to the United States in the year 1796; he resided in Philadelphia; was there about thirty years; but during that time made several voyages, about his commercial affairs, to Europe and the West Indies.

3. To the third cross-interrogatory on the part of the defendant, he answers as follows: He had no connection in business with Andrew Courcier other than having made, at different times, four or five shipments of goods jointly with him, on speculation. This joint interest or connection commenced when the said goods were purchased, and ended when they were sold; his (said witness's) connection with said Courcier had no further commercial extent than this. These four or five speculations, jointly with said Courcier, were at intervals; and all connection of the kind, or of a commercial nature, ceased about twenty years ago.

4. To the fourth interrogatory on the part of the plaintiff, he answers as follows: He left the United States in the year 1827, and came to Marsailles, where he has lived ever since; he has followed no occupation since leaving the United States—has none now.

5. To the fifth interrogatory on the part of the defendant, he answers as follows: In the year 1818, John Dabadie was about leaving the United States to reside in France, and had many business matters with the said Courcier, which remained unsettled; both Courcier and Dabadie, in order to avoid future difficulty, resolved to have a final settlement of their affairs with each other, and in the progress of the settlement various points of difference arose between them, which they could not reconcile or adjust, and the matter of the said schooner Spencer was one of those points of difficulty; he, said witness, being the friend of both parties and associating constantly with them, they mentioned their difficulties and differences to him, and they both verbally agreed to leave the whole to him to settle; accordingly, the said Dabadie and Courcier met several times before him (said witness) in Philadelphia, and discussed, conversed upon and explained, their said affairs, and all the points of difference between them; each one, on the several occasions, stating his own case and view of it, and at length a final settlement took place between them (the said Courcier and Dabadie) through the mediation of said witness.

6. To the sixth interrogatory on the part of the said defendant he answers as follows: The said settlement was reduced to writing in the shape of an account current, as was customary. Two accounts current were made exactly the same in every particular, both original. One of them was signed by said Dabadie, and delivered to said Courcier, and the other was signed by said Courcier, and delivered to said Dabadie, and all the matters which had been in dispute be-

tween them were settled in said account current. It was a full and final settlement.

7. To the seventh interrogatory on the part of the said defendant, he answers as follows: The said settlement was reduced to writing in the manner and form mentioned in the answer to the sixth cross-interrogatory on the part of said defendant.

8. To the eighth cross-interrogatory on the defendant, he answers as follows: He recollects the two voyages already mentioned, made by said schooner Spencer, one from Philadelphia to St. Sebastian in Spain, and the other from New York to Bayonne in France, and none other. Said Dabadie was interested in those two voyage.

9. To ninth cross interrogatory on the part of the said defendant, he answers as follows: He has not at any time received any letter or letters from said Courcier, or from any other person, containing any extract or summaries from said Courcier's account book relating to his various transactions with John Dabadie, or explaining his view or understanding of his business relations with said Dabadie, or to the suit between Frevall and Bache, administrator of Dabadie; and to the whole of this last interrogatory, he answers in the negative, and further saith not.

H. FONIERE.

Signed before me,
D. C. CROXALL, *Commissioner.*

Consulate of the United States of America at Marseilles.

I, D. C. Croxall, Consul of the United States of America for the port of Marsailles and dependencies, certify that Herman Berniard, a merchant of Marsailles, personally appeared before me at my house in Marsailles, on the day and year mentioned at the head of the foregoing deposition, (25th inst.) and exhibited to me a letter purporting to be from Mr. A. Dabadie, consul of the United States at Venice, in which said Berniard was requested to attend and be present at the examination of Honoire F. Forniere, the witness above named, and I certify that said Forniere was present at the time, and that I told said Berniard it was an open proceeding, in a public office, at which any person might attend, and thereupon he set down by me and heard the whole of the foregoing evidence.

[SEAL.] Witness my hand and official seal, this 25th September, 1838.

D. C. CROXALL, *U. S. C.*

Interrogatories to be propounded on the part of the complainant to Fournier, at Marsailles, France.

PETER E. FREVALL,
vs.
FRANKLIN BACHE, Administrator of John Dabadie, et alias.
In Equity. No. 408.

Interrogatories to be propounded on the part of the complainant to Fournier, at Marsailles, France.

Interrogatory 1. Do you know the parties, complainant and defendant, and how long have you known them, and where?

Interrogatory 2. Were you, or were you not present at a settlement in June 1818, between Andrew Curcier and John Dabadie, late of Philadelphia, deceased; and if yea, where was such settlement made?

3. If you answer the second interrogatory in the affirmative, state whether the said settlement was or was not effected and arranged, or brought about, by yourself as umpire or mediator between the said Curcier and Dabadie?

4. If you answer the third interrogatory in the affirmative, state whether or not the interest or ownership of the schooner Spencer, Captain Moffett, both hull and cargo, on the first voyage in October 1809, from Philadelphia to St. Sebastain, in Spain, where she was sequestered after her arrival in December 1809, was or was not one of the matters settled between the said Curcier and Dabadie; and if yea, to whom was it agreed between them upon such settlement that the claim upon the French government for indemnity for such sequestration of the Spencer should belong?

5. If you answer the fourth interrogatory in the affirmative, state whether, during the time the said settlement was in progress, the said Dabadie did or did not urge upon the said Curcier the propriety of his (Curcier's) receiving again and retaining the ownership of the said schooner Spencer and cargo, for the said first voyage and of the claim on the French government for said indemnity, because he, said Curcier, had always assured said Dabadie that he should never lose by having held the same as a security.

6. If you answer the 2d, 3d, 4th and 5th interrogatory in the affirmative, state whether there *was* or *was* not many allowances made to the said Dabadie by said Curcier upon such settlement, besides giving him, said Dabadie, credit for the amount of the Spencer and her cargo in account; and if yea, state the same as fully as you can.

DANIEL C. CROXALL, Esquire,
Consul at Marsailles, Complainant's Commissioner.

PETER E. FREVALL, *vs.* FRANKLIN BACHE, Administrator of John Dabadie.	Circuit Court for the District of Columbia for the County of Washington. March Term, 1838.

Cross Interrogatories to be propounded on the part of the respondent to H. F. Fournier, at Marsailles, France.

1. How old are you?

2. When did you go to the United States of America, and how long did you remain there? Where did you reside during that time?

3. Had you any connexion in business with Andrew Curcier during the time you resided in the United States? If yea, what was the nature of that connexion; how long did it continue; and when did it cease?

4. When did you leave the United States? Where have you resided since you left that country? What has been your occupation since your return from that country; and what is your occupation now?

5. If you answer the complainant's third interrogatory in the affirmative, state by what authority you became umpire or mediator between the said Curcier and Dabadie; and say, also, whether the authority under which you acted as umpire or mediator was verbal or in writing. If it was in writing, annex a copy of the same to your answers to these interrogatories. If the said authority was merely verbal, say how the same was communicated to you, and state fully the substance thereof, as far as you can recollect the same.

6. If you answer the complainant's second interrogatory in the affirmative, state whether the said settlement was reduced to writing.

7. If you say the said settlement was not put in writing, say whether the terms of it were communicated to any other person or persons besides yourself. If yea, name such person or persons to whom they were communicated.

8. How many voyages did the schooner Speneer make? At what times, and from and to what ports, were these voyages respectively made? In how many, and which, of those voyages was Mr. Dabadie interested?

9. Have you received any letter or letters from Andrew Curcier, or any other person, containing any extracts or summaries from said Curcier's account books, relating to his various transactions with John Dabadie, or explaining his understanding of his business relations with said Dabadie, or in any way relating to the alleged settlement between Curcier and Dabadie, or to this suit between Frevall and Bache, the administrator of Dabadie? If you have ever received any such letter or letters, state how many you have received, and annex the same to your answer to these interrogatories. If you have not got them, state particularly what has become of them; and

if the same have been destroyed, say where they were so destroyed, and for what reason.

PETER E. FREVALL,
vs.
FRANKLIN BACHE,
Administrator of John Dabadie.

Circuit Court of the District of Columbia for the County of Washington.

It is agreed that the answers of H. F. Fournier, of Marsailles, in France, to the annexed interrogatories and cross-interrogatories, taken, reduced to writing, sworn to and subscribed before Daniel C. Croxall, Esquire, consul at Marsailles, and so certified by him, and returned directed to "the circuit court of the District of Columbia for the county of Washington," shall be considered as a deposition taken under a commission from the said court, in the above named case, regularly issued and executed, subject to all exceptions to the form of the interrogatories, and to the competency of the testimony which may be given.

EDW'D D. INGRAHAM,
for Trevall.
JAS. BAYARD,
for Bache.

August 6, 1836.

Whereupon, all and singular the premises being by the court here seen and understood, and the said parties, by their solicitors, being heard, and after mature deliberation being thereupon had, it is ordered by the court here that the complainant's said bill be dismissed with costs.

Test:

W. BRENT, *Clerk.*

Appeal to S. Court U. States.

Whereupon, the said complainant, by his solicitor aforesaid, prayed an appeal from the judgment and decree aforesaid, made by the court in the premises to the Supreme Court of the United States; and to them it is granted. Whereupon, he filed in court here the following appeal bond, to *to:*

Appeal Bond.

Know all men by these presents, that we, Peter E. Frevall, Alfred Plunkett and George D. Abbott are jointly and severally held and firmly bound unto Franklin Bache in the full and just sum of three hundred dollars, current money, to be paid to the said Franklin Bache, his certain attorney, heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, and each of us, our, and each of our, heirs, executors and

administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twenty-fourth day of May, A. D. 1839.

Whereas, lately, at a circuit court of the District of Columbia, sitting as a court of equity for Washington county, in a cause wherein the said Peter E. Frevall was complainant, and Franklin Bache, administrator of John Dabadie, and others, were defendants, a decree was rendered against the said complainant, and he having entered an appeal to the Supreme Court of the United States:

Now, the condition of the above obligation is such, that, if the said Peter E. Frevall shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; otherwise, to be and remain in full force and virtue in law.

Signed, sealed and delivered in the presence of Wm. H. Coles, by Peter E. Frevall and Alfred Plunkett. PETER E. FREVALL, [SEAL.] A. PLUNKETT, [SEAL.]

Geo. Naylor, as to GEO. D. ABBOTT, [SEAL.]

Approved: W. CRANCH.

And the same being approved of, it is ordered that a record of the proceedings aforesaid, with all things thereunto relating, be transmitted to the said Supreme Court of the United States, which is done accordingly.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the said court, this 12th day of September, 1839. [L. S.]

W. BRENT, *Clerk.*

District of Columbia, *to wit:*

The United States of America to Franklin Bache, Administrator of John Dabadie, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States on the first Monday of August next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the District of Columbia, in the county of Washington, wherein Peter E. Frevall is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said Peter E. Frevall, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable W. Cranch, chief judge of the circuit court of the District of Columbia, this 30th day of May, A. D. 1839.

W. CRANCH.

Service acknowledged.

434.

SUPREME COURT OF THE UNITED STATES.

No. 40.

THE BANK OF ALEXANDRIA, PLAINTIFF IN ERROR,

vs.

EDWARD AND FRANCIS C. DYER.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE COUNTY OF WASHINGTON.

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Langtree & O'Sullivan, Print.

UNITED STATES OF AMERICA, *sct.*

[SEAL.] The President of the United States to the Judges of the Circuit Court of the United States for the District of Columbia, sitting for the County of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit, before you or some of you, between the President, Directors and Company of the Bank of Alexandria, plaintiffs, and Edward Dyer and Francis C. Dyer, defendants, a manifest error hath happened, to the great damage of the said President, Directors and Company of the Bank of Alexandria, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your hand, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the Monday of next, in the said Supreme Court, to be then and there held, and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the laws and customs of the United States, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the said Supreme Court.

Issued this 25th day of June, 1838.

W. BRENT,
Clerk C. Ct. Dist. Col. for Washington county.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to Edward Dyer and Francis C. Dyer, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, on the Monday of next, pursuant to a writ of error filed in the clerk's office of *of* the circuit court of the United States for the District of Columbia, in the county of Washington, wherein the President, Directors and Company of the Bank of Alexandria are plaintiffs in error and you are defendants in errror, to show cause, if any there be, why judgment rendered against the said President, Directors and Company of the Bank of Alexandria, in the said writ of error mentioned, should not

be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. W. Cranch, chief judge of the circuit court of the District of Columbia, this 25th day of June, 1838.

W. CRANCH.

Service acknowledged: BRENT & BRENT,
for Appellees.

February 6th, 1839.

Know all men by these presents, that we, John Roberts, P. E. Hoffman, and Robert H. Miller, are held and firmly bound unto Edward Dyer and Francis C. Dyer in the full and just sum of two thousand dollars, current money, to be paid to the said Edward Dyer and Francis C. Dyer, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals, and dated this 25th day of June, 1838.

Whereas, lately at a circuit court of the United States for the District of Columbia, sitting for the county of Washington, in a suit pending in the said circuit court, wherein the President, Directors and Company of the Bank of Alexandria were plaintiffs, and the said Edward Dyer and Francis C. Dyer were defendants, judgment was rendered against the said President, Directors and Company of the Bank of Alexandria, and they having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward Dyer and Francis C. Dyer, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the Monday of next.

Now the condition of the above obligation is such, that if the said President, Directors and Company of the Bank of Alexandria shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue.

JOHN ROBERTS, [SEAL.]
P. E. HOFFMAN, [SEAL.]
ROBERT H. MILLER, [SEAL.]

Signed, sealed, and delivered in the presence of
WM. C. PAGE,
EDW'D C. FLETCHER.

Approved, W. CRANCH.

Copy, Test: W. BRENT, *Clerk*.

Style of Court.

DISTRICT OF COLUMBIA, *to wit:*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of March, being the twenty-sixth day of the same month, in the year of our Lord one thousand eight hundred and thirty-eight, and of the Independence of the United States the sixty-second.

Present,

The Honourable WILLIAM CRANCH, *Chief Judge*,
BUCKNER THRUSTON &
JAMES S. MORSELL, *Assis't Judges.*

ALEXANDER HUNTER, *Esquire, Marshal.*
WILLIAM BRENT, *Clerk.*

Parties.

In the record of the proceedings of the said court, among others are the following, to wit:

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF ALEXANDRIA,
vs.
EDWARD DYER, AND
FRANCIS C. DYER,

Be it remembered, that heretofore, to wit, on the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and thirty-five, the said plaintiffs, by Coxe and Carlisle, Esquires, their attorney, prosecuted and sued forth, out of the circuit court here, the United States writ of capias ad respondendum, directed to the marshal of the District aforesaid, in the words and of the tenor following, to wit:

Writ of Cap. ad Resp.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the Marshal of the District of Columbia, greeting:

We command you that you take Edward Dyer and Francis C. Dyer, late of Washington county, if they shall be found within the county of Washington, in your district, and them safely keep, so that you have their bodies before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the fourth Monday of November next, to answer unto the President, Directors, and Company of the Bank of Alexandria, in a plea of trespass on the case, and so forth.

Hereof fail not at your peril, and have you then and there this writ.

Witness, W. Cranch, Esquire, Chief Judge of our said circuit court, at the city of Washington, the 6th day of June, Anno Domini one thousand eight hundred and thirty-five.

Issued the 26th day of October, 1835.

W. BRENT, *Clerk.*

And the aforesaid plaintiffs, by their attorney aforesaid, on the day of prosecuting and suing forth of the aforesaid writ, declare against the said defendants, in the plea aforesaid, in form following, to wit:

Nar.

DISTRICT OF COLUMBIA, WASHINGTON COUNTY, *to wit:*

Edward Dyer and Francis Dyer, late of the county aforesaid, trading under the name, firm, and style of Edward Dyer & Co., were attached to answer unto the President, Directors and Company of the Bank of Alexandria in a plea of trespass on the case, &c.

And whereupon the said plaintiffs, by Coxe and Carlile their attorneys, complain, for that, whereas, heretofore, to wit: On the first day of January, in the year of our Lord one thousand eight hundred and thirty-five, at the county aforesaid, the said defendants, trading together as aforesaid, were indebted to the plaintiffs in the sum of two thousand five hundred dollars, for the like sum of money by the plaintiffs to and for the use of the defendants, trading together as aforesaid, before that time paid, laid out, and expended, at the special instance and request of the defendants so trading, and for other money by the plaintiffs before that time lent and advanced to the defendants, trading as aforesaid, at their special instance and request; and for other money by the defendants, partners as aforesaid, before that time had and received to the use of the plaintiffs, and being so indebted, the defendants, partners as aforesaid, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, undertook and promised the plaintiffs to pay them the last mentioned sum of money when afterwards they should be thereunto required.

Yet the defendants the said several sums of money herein mentioned, or any part thereof, (although often thereunto requested, to wit, on the day and year last aforesaid, at the county aforesaid, and often afterwards,) have not paid, but the same or any part thereof to pay have hitherto wholly refused and still do refuse, to the damage of the plaintffs in the sum of five thousaud dollars current money, and therefore they bring suit and sue forth.

COXE & CARLISLE, *for the Plaintiffs.*

November Term, 1835.

At which mentioned fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-five, and the day of the return of the aforegoing writ, come into the circuit court here, the said plaintiffs, by their attorney aforesaid, and the marshal of the district aforesaid, to whom the said aforegoing writ was in form

aforesaid directed, makes return thereof to the court here, thus endorsed, to wit:

Marshal's Return.

"Cepi,"

A. HUNTER, *Marshal.*

Defendants Appear, rule, plea, and imparlance to March Term 1836.

And the said defendants being called, appear in court here by Brent and Brent, Esqs., their attorneys; and thereupon, on the motion of the said plaintiffs, by their attorney aforesaid, it is ruled by the court here that the said defendants answer to the declaration aforesaid of the said plaintiffs, in the plea aforesaid, or judgment by the court here will be entered against them in default thereof. And the said defendants, by their attorney aforesaid, defend the force and injury when, and so forth, and pray leave of the court here to imparle until the fourth Monday of March next, and then to answer to the declaration aforesaid of the said plaintiffs in the plea aforesaid, and to them it is granted; the same day is given to the aforesaid plaintiffs also.

Defendants Appear and Plea of Limitations.

At which said fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-six, to which said day the said defendants had leave to imparle, and then to answer to the declaration aforesaid of the said plaintiffs in the plea aforesaid, come into the circuit court here as well as the said plaintiffs, by their attorney aforesaid, as the said defendants, by their attorney aforesaid; the said defendant by his attorney aforesaid, heretofore, to wit, on the first Monday of March inst. filed the following plea. And the said defendants, by their attorney aforesaid, as before, defend the force and injury, when, and so forth, and say, that the said defendants did not undertake and promise, in manner and form as the said plaintiffs hath above complained against them, and of this they put themselves upon the country, and so forth.

And the said defendants, with the leave of the court here first had and obtained, according to the form of the statute in such case made and provided, further come and defend the force and injury, when, and say that the said plaintiffs their action aforesaid against them, the said defendants, to have or maintain, ought not, because they say that they, the said defendants, did not, at any time within three years next before the day of impetrating the original writ of them the said plaintiffs in this cause, against them the defendants, undertake or promise in manner and form as the said plaintiffs have above complained, and this the said defendants are ready to verify. Wherefore they pray judgment, if the plaintiffs ought to have or maintain their aforesaid action thereof against them the said defendants, &c. And the said defendants, with leave of the court here first had and obtained, according to the form of the statute in such case made and provided, fur-

ther come and defend the wrong and injury, when, &c., and say that the said plaintiffs their action aforesaid against them the defendants to have or maintain ought not, because they say that the several causes of action in the said declaration mentioned, did not, nor did any of them accrue to the said plaintiffs at any time within three years next before the day of the impetration of the writ original of the said plaintiffs in this cause, and this the defendants are ready to verify. Wherefore they pray judgment if the said plaintiffs their action aforesaid thereof against them the said defendants ought to have or maintain, &c.

BRENT & BRENT, *for Defendants.*

Whereupon the said plaintiffs, by their attorney aforesaid, entered the following general replication to the plea of limitations, so as aforesaid pleaded by the defendants, to wit:

Replication to plea limitations.

And the said plaintiffs say, that they by anything by the said defendants in their plea of limitations above alleged from having their action against them the said defendants ought not to be precluded, because they say that they, at the time of making the promise and assumption aforesaid, were in the county of Alexandria in the District of Columbia, beyond the seas, and so in the county of Alexandria, beyond the seas, remained and continued until the day of the impetration of the original writ aforesaid, to wit, at Washington city aforesaid, and this they are ready to verify, &c.

Wherefore they pray judgment, and their damages by reason of the premises to be adjudged to them, &c., &c.

COXE & CARLISLE, *for Plaintiffs.*

General Demurrer to Replication.

And the said defendants say that the plea aforesaid, by the said plaintiffs, in manner and form above, in replying pleaded, and the matters therein contained are not sufficient in law for the said plaintiffs to have or maintain their action aforesaid thereof against them, the said defendants; and that they, to the plea aforesaid, in manner and form aforesaid pleaded, have no necessity, nor are they, by the law of the land, obliged, in any manner, to answer, and this they, the said defendants, are ready to verify; wherefore, for want of a sufficient replication in this behalf, the said defendants, as before, pray judgment; and that the said plaintiffs may be precluded from their action aforesaid thereof against them had, &c.

Joinder.

Whereupon the said plaintiffs, by their attorney aforesaid, say, that the plea aforesaid, by them, the said plaintiffs, in manner and form aforesaid above, by replying pleaded, and the matters therein contained are good and sufficient in law to maintain the action of them the said plaintiffs aforesaid thereof against the said defendants;

which said plea, and the matter in the same contained, they, the said plaintiffs, are ready to verify and prove, as the court, &c.; and because the said defendants do not answer to that replication, nor hitherto any way deny it, they, the same plaintiffs, as before, pray judgment, and their debt aforesaid, together with their damages, by reason of the detention of that debt, to be adjudged to them, &c.

Continuation to November Term, 1836.

"Whereupon, for that the court here are not advised to give their judgment of and upon the premises aforesaid, day therefore is further given to the said parties to hear thereof their judgment until the fourth Monday of November next, for that the said court have as yet and not, &c."

Appearance and Continuance to March Term, 1837.

At which said fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-six, come again into the said circuit court here, as well the said plaintiffs, by their attorney aforesaid, as the said defendants, by their attorney aforesaid; thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attornies aforesaid, and by order of the court here thereon, is further continued until the fourth Monday of March next.

Appearance, and Continuance to November Term, 1837.

At which said fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-seven, come again into the circuit court here, as well the said plaintiffs, by their attorney aforesaid, as the said defendants by their attorney aforesaid; thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attornies aforesaid, and by order of the court here thereon, is further continued until the fourth Monday of November next.

Appearance, and Continuance to March Term, 1838.

At which said fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-seven, come again into the said circuit court here, as well the said plaintiffs, by their attorney aforesaid, as the said defendants, by their attorney aforesaid; thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attornies aforesaid, and by order of the court here thereon, is further continued until the fourth Monday of March next.

Judgment of this Court for Defendants.

At which said fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-eight, come again into the circuit court here, as well the said plaintiffs, by their attorney afore-

said, as the said defendants, by their attorney aforesaid; whereupon all and singular the premises being seen, and by the court here more fully understood, and mature deliberation being thereon had, it appears to the court here that the plea aforesaid, by the said defendants, in manner and form above pleaded, and the matters in the same contained, are good and sufficient in the law to preclude the said plaintiffs from having or maintaining their action aforesaid thereof against the said defendants, &c.; it is therefore considered by the court here that the said plaintiffs take nothing by their writ and declaration aforesaid, but for their false plaint be thereof in mercy, &c., and that the said defendants may go hence without day, &c.; and it is further considered by the court here that the said defendants recover against the said plaintiffs the sum of dollars and cents, by the court here adjudged unto the said defendants, for their costs and charges which they have sustained, laid out, and expended, in and about their defence in this behalf; and that the said defendants may have thereof execution, &c.

Test: W. BRENT, *Clerk*.

Appeal to Supreme Court U. States.

And whereas, afterwards, to wit, on the twenty-fifth day of June, in the year of our Lord one thousand eight hundred and thirty-eight, the said President, Directors and Company of the Bank of Alexandria aforesaid, produced and filed in court here the United States writ for the correcting of errors, of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia, in the county of Washington; and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed is hereby transmitted to the said Supreme Court accordingly.

Clerk's Certificate and Seal.

In testimony whereof I have hereunto subscribed my name, and affixed the seal of the said court at the city of Washington this 4th day of February, A. D. 1839.

W. BRENT, *Clerk*.

437.

SUPREME COURT OF THE UNITED STATES.

No. 41.

ELIAS KANE, PLAINTIFF IN ERROR,

vs.

GABRIEL PAUL, EXECUTOR OF EDWARD COURSAULT.

IN ERROR TO THE CIRCUIT COURT U. S. FOR WASHINGTON.

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Langtree & O'Sullivan, Print.

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the Judges of the Circuit Court of the United States for the District of Columbia, sitting for the County of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you or some of you, between Gabriel Paul, executor of Edward Coursault, plaintiff, and Elias Kane, defendant, a manifest error hath happened to the great damage of the said Elias Kane, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of August next, in said Supreme Court, to be then and there had and held; and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the laws and custom of the United States should be done.

[SEAL.] Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court.

Issued this first day of May, 1839.

W. BRENT,
Clerk C. C. D. C. for the County of Washington.

Filed 6th May, 1839.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America, to Gabriel Paul, Executor of Edward Coursault, greeting:

You are hereby cited and admonished to be and appear, at a Supreme Court of the United States, on the first Monday of August next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the District of Columbia, in the county of Washington, wherein Elias Kane is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said Elias Kane, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Hon. W. Cranch, chief judge of the circuit court of the District of Columbia, this first day of May, 1839.

W. CRANCH.

Service acknowledged.

RICHARD S. COXE,
for G. Paul.

December, 17th, 1839.
Filed 6th May, 1839.

Know all men by these presents, that we, Elias Kane, John K. Kane, and Thomas Dunlap, are held and firmly bound unto Gabriel Paul, in the full and just sum of seventeen thousand dollars, current money, to be paid to the said Gabriel Paul, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this second day of May, 1839.

Whereas lately at a circuit court of the United States for the District of Columbia, sitting for the county of Washington, in a suit pending in the said circuit court, wherein the said Gabriel Paul, executor of Edward Coursault was plaintiff, and the said Elias Kane was defendant, judgment was rendered against the said Elias Kane, and he having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said Gabriel Paul, executor of Edward Coursault, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of August next.

Now the condition of the above obligation is such, that, if the said Elias Kane shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue in law.

ELIAS KANE, [SEAL.]
J. K. KANE, [SEAL.]
J. DUNLOP, [SEAL.]

Signed, sealed, and delivered in the presence of
J. K. KANE and T. DUNLOP,
JOHN L. RIDDLE, THOMAS BIDDLE,
McCLINTOC YOUNG, as to signature, &c., of Elias Kane.

Approved,

W. CRANCH,
6th May, 1839.

Copy.

Test:

W. BRENT, *Clerk.*

Style of Court.

DISTRICT OF COLUMBIA, *sct.*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of March, being the twenty-fifth day of the same month, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States of America the sixty-third.

Were present,

The Honorable WILLIAM CRANCH, *Chief Judge*,
BUCKNER THRUSTON, } *Ass't Judges.*
JAMES S. MORSELL, }
ALEXANDER HUNTER, Esq., *Marshal.*
WM. BRENT, *Clerk.*

Parties.

In the record of the proceedings of the said court, among others, are the following, to wit:

GABRIEL PAUL, Ex'or of Edward Coursault, }
vs. }
ELIAS KANE. }

Be it remembered that heretofore, to wit, on the ninth day of November, in the year of our Lord one thousand eight hundred and thirty-seven, the said plaintiff, by Coxe & Carlisle, Esquires, his attorneys, prosecuted and sued forth, out of the circuit court here, the United States writ of capias ad respondendum, directed to the marshal of the District of Columbia, in the words and of the tenor following, to wit:

Capias ad Respondendum.

DISTRICT OF COLUMBIA, to wit:

The United States of America, to the Marshal of the District of Columbia, Greeting:

We command you that you take Elias Kane, late of Washington county, if he shall be found within the county of Washington, in your said district, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the fourth Monday of November, instant, to answer unto Gabriel Paul, executor of the last will and testament of Edward Coursault, in a plea of trespass on the case, and so forth.

Hereof fail not, at your peril, and have you then and there this writ.

Witness, W. Cranch, Esquire, chief judge of our said court, at

the city of Washington, the 15th day of August, anno Domini one thousand eight hundred and thirty-seven.

Issued the ninth day of November, 1837.

W. BRENT, *Clerk.*

(C. & C.)

And the aforesaid plaintiff, by his attorney aforesaid, on the day of prosecuting and suing forth of the aforesaid writ, declared against the said defendant in the plea aforesaid, in form following, to wit:

Narr.

DISTRICT OF COLUMBIA, WASHINGTON COUNTY, to wit:

Elias Kane, late of the county aforesaid, was attached to answer unto Gabriel Paul, executor of the last will and testament of Edward Coursault, deceased, in a plea of trespass on the case, and so forth. And whereupon the said plaintiff, executor as aforesaid, by Coxe & Carlisle, his attorneys, complains that, whereas the defendant, on the first day of August, in the year eighteen hundred and thirty-seven, at the county aforesaid, was indebted to the plaintiff, executor as aforesaid, in the sum of ten thousand dollars, current money of the United States, for sundry matters and articles, properly chargeable in an account, as by a particular account thereof, herewith into court exhibited, appears; and being so indebted, the defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and faithfully promised to the plaintiff, executor as aforesaid, to pay him the aforesaid sum of money, when he should be thereunto afterwards required.

And whereas, also, the defendant, on the first day of August, in the year eighteen hundred and thirty-seven, at the county aforesaid, was indebted to the plaintiff, executor as aforesaid, in the further sum of $10,000, for merchandise, before that time sold and delivered by the plaintiff to the defendant, at his special request; and in the further sum of $10,000, for money by the defendant had and received for the use of the plaintiff, executor as aforesaid; and in the further sum of $10,000, for money lent and advanced by the plaintiff, executor as aforesaid, at his, the defendant's, request; and in the further sum of $10,000, for money paid, laid out and expended by the plaintiff, executor as aforesaid, for the use of the defendant, at his, the defendant's, request: And, being so indebted, the defendant afterwards, that is to say, on the day and year aforesaid, at the county aforesaid, in consideration thereof, undertook, and then and there faithfully promised to the plaintiff, executor as aforesaid, that he, the defendant, the said several sums of money, when required, would well and truly pay to the plaintiff, executor as aforesaid.

And, whereas, the defendant afterwards, that is to say, on the first day of August, in the year aforesaid, at the county aforesaid, accounted with the plaintiff, executor as aforesaid, of and concerning divers sums of money, from the said defendant to the said plaintiff, execu-

tor as aforesaid, before that time due, owing, then in arrear, and unpaid; and upon such accounting, the said defendant was then and there found in arrear and indebted to the said plaintiff, executor as aforesaid, in the further sum of $10,000; and being so found in arrear and indebted, the said defendant afterwards, that is to say, on the day and year last mentioned, at the county aforesaid, in consideration thereof, undertook, and then and there faithfully promised, to pay to the plaintiff, executor as aforesaid, when thereto afterwards required, the said mentioned last sum of money.

Nevertheless, the defendant, his said promises in no wise regarding, the said several sums of money, or any part thereof, though often required, to the plaintiff, executor as aforesaid, hath not paid, but the same to pay hath always refused and still refuseth, to the damage of the plaintiff, executor as aforesaid, $10,000; and thereupon he brings suit, &c.

For the plaintiff, COXE & CARLISLE.

At which mentioned fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-seven, and the day of the return of the foregoing writ, comes into the circuit court here the said plaintiff, by his attorney, and the marshal of the District aforesaid, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here, thus endorsed, to wit:

Marshal's Return.

"Cepi.

A. HUNTER, *Marshal.*"

Defendant's Appearance—Rule—Plea—and Imparlance to March Term, 1838.

And the said defendant, being called, appears in court here, by Francis S. Key, Esq., his attorney; and thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here, that the said defendant answer to the declaration aforesaid, of the said plaintiff, in the plea aforesaid, or judgment by the court here will be entered against him in default thereof, and the said defendant, by his attorney aforesaid, defend the force and injury, when, and so forth; and prays leave of the court here to imparl until the fourth Monday of March next, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid; and to him it is granted; and the same day is given to the aforesaid plaintiff also.

Plea of Non-Assumpsit—Issue Joined—Venire Facias to November Term, 1838.

At which said fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-eight, to which said day the said defendant had leave to imparl, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, comes again

into the circuit court here, as well the said plaintiff, by his attorney aforesaid, as the said defendant, by his attorney aforesaid; and the said defendant, by his attorney aforesaid, as before, defends the force and injury, when, and so forth, and saith that he did not assume upon himself, in manner and form as the aforesaid plaintiff above against him hath complained, and of this he puts himself upon the country; and the said plaintiff in like manner, and so forth; therefore let a jury thereon appear before the court here, on the fourth Monday of November next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., and the same day is given to the aforesaid parties, then and there, &c.

Appearance, and Continuance to March, 1839.

At which said fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-eight, comes again into the circuit court here as well the said plaintiff, by his attorney aforesaid, as the said defendant, by his attorney aforesaid; thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties, by their attorneys aforesaid, and by order of the court here thereon, the said cause is continued until the fourth Monday of March next.

And now, at this day, to wit, the said fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-nine, comes again into the circuit court here as well the said plaintiff, by his attorney aforesaid, as the said defendant, by his attorney aforesaid; whereupon, for trying the issue aforesaid, it is ordered by the court here, that twelve persons, from the panel of petit jurors returned to the court here by the marshal of the District of Columbia, be called; who, being called, come, to wit:

Jury.

1. George Crandle,
2. Joseph Brooke,
3. Richard Brooks,
4. Vincent King,
5. Samuel Smoot,
6. Thomas J. Belt,
7. Henry H. McPherson,
8. Anthony Smith,
9. Samuel Bacon,
10. Charles Butler,
11. Thos. T. Barnes,
12. Thos. Parker.

Who, being empanelled and sworn to say the truth in the premises, upon their oath, do say, that the said defendant did assume upon himself in manner and form as the aforesaid plaintiff within against him hath complained, and they assess the damages of the said plaintiff, sustained by occasion of the non-performance of the promise and assumption aforesaid, to the sum of eight thousand one hundred and seventy-five dollars and twenty-six cents, with interest on five thousand four hundred and seventeen dollars and thirty-nine cents, part thereof, with interest from the tenth day of April, eighteen hundred and thirty-seven; on six hundred and eighty-eight dollars and one cent, part thereof, with interest from fifteenth April, eighteen hundred

and thirty-seven; on five hundred and forty-four dollars and sixty cents, part thereof, with interest from eleventh of May, eighteen hundred and thirty-seven; on twelve hundred and fifty-eight dollars and thirty-one cents, part thereof, with interest from fifth day of April, eighteen hundred and thirty-eight, and on two hundred and sixty-six dollars and seventy-five cents, other part thereof, with interest from fifteenth day of November, eighteen hundred and thirty-eight, until paid; therefore, it is considered by the court here, that the aforesaid plaintiff recover against the said defendant as well the sum of eight thousand one hundred and seventy-five dollars and twenty-six cents, current money, with interest as aforesaid, so as aforesaid, by the jurors aforesaid, in form aforesaid assessed, to be sustained by occasion of the non-performance of the promise and assumption aforesaid, as the sum of dollars and cents, by the court here, unto him the said Elias Kane, on his assent adjudged, for his costs and charges by him about his suit in this behalf laid out and expended; and the said defendant in mercy, &c.

Memorandum.

Before the jurors aforesaid retired from the bar of the court here, the said defendant, by his attorney aforesaid, filed in court here the following bills of exceptions, to wit:

Defendant's 1st Bill of Exceptions.

Defendant's 1st bill of exceptions, to wit:

GABRIEL PAUL, Ex'or of Coursault,
vs.
ELIAS KANE.

On the trial of this cause, on the agreement, (copied in page) the plaintiff having offered the evidence therein stated, the defendant then produced and offered in evidence the exemplification of the letters of administration granted to defendant on the estate of the said Edward Coursault, (copied in page ,) the proceedings in the orphans' court of Washington county, District of Columbia.

And the plaintiff thereupon offered in evidence his letters testamentary, a copy of the will annexed thereto, (copied in page ,) and proved that the plaintiff was alive in 1837, 28th March, and was then and now living in the State of Missouri.

And the court thereupon were of opinion, and so directed the jury, that the letters of administration offered by the defendant were no bar to the plaintiff's action, and that the plaintiff's said letters testamentary, and the other evidence aforesaid, if believed by the jury, entitled him to recover the amount so received by the defendant according to certificate of Houston.

To which opinion and instruction the defendant excepts, and this his bill of exceptions is signed, sealed and ordered to be enrolled, this 27th of April, 1839.

W. CRANCH, [SEAL.]
JAMES S. MORSELL, [SEAL.]

Agreement of counsel referred to in the foregoing bill of exceptions, (page .)

Agreement of Counsel.

GABRIEL PAUL, Ex'or of Edward Coursault,
vs.
ELIAS KANE.

It is agreed in this case that any defence may be made under the plea of the general issue in this action, that could be now specifically pleaded in bar of the action.

The plaintiff in this case offered in evidence the award of the commissioners, and a copy of the power of attorney from plaintiff to Aglae Coursault, by copies from the State Department, and it was admitted on both sides that these papers, and the memorial on which the said award was made, were evidence in the cause, and also Houston's certificate, (copied in page .)

RICH'D S. COXE,
for Plaintiff.
F. S. KEY,
for Defendant.

Proceedings of the Orphans' Court.

Proceedings of the orphans' court of Washington county, D. C., referred to in foregoing bill of exceptions, (page .)

WASHINGTON COUNTY, *District of Columbia.*

On this 27th of March, 1837, personally appeared before me, Thomas Dunlap, and made oath in due form that Edward Coursault died some time in 1814, in the city of Baltimore, as he has always understood and fully believes.

And that his widow and executrix, Auglae Coursault, died about two years ago, as he has understood and fully believes.

Sworn to before me, one of the United States justices of the peace, in and for Washington county aforesaid, on the day and year above mentioned.

THOS. DUNLAP.

Subscribed and sworn to before me,

GEO. NAYLOR, *J. P.*

Mr. Roach will issue the letters of administration to Mr. Elias Kane, with Thomas Dunlap and Jn. K. Kane as securities, upon the estate of Edward Coursault, and will file the bond and the affidavit, and this letter to accompany them.

S. CHASE.

March 29th, 1837.

DISTRICT OF COLUMBIA, *Washington county, to wit:*

I certify that the aforegoing are true copies from the originals filed in my office.

[SEAL.] Witness my hand and seal of office, this 27th day of April, 1839.

ED. N. ROACH,
Register of Wills.

UNITED STATES OF AMERICA,
Washington county, District of Columbia, to wit:

To all whom these presents shall come, greeting:

Know ye, that on the 28th day of March, in the year of our Lord, 1837, letters of administration de bonis non, with the will annexed of all and singular the goods, chattels, and credits which were of Edward Coursault, late of Baltimore, Maryland, deceased, was, by the orphans' court of Washington county aforesaid, granted and committed unto Elias Kane—he having first entered into bond, with approved securities, for the faithful performance of the duties thereof.

[SEAL.] Witness, Nathaniel P. Causin, Esq., judge of the orphans' court of Washington county, D. C., this 27th April, 1839.

Test: ED. N. ROACH,
Register of Wills.

The Last Will and Testament of Edward Coursault, referred to in the foregoing bill of exceptions, (page .)

Edward Coursault, his last Will and Testament.

In the name of God, Amen! I, Edward Coursault, of Baltimore, merchant, considering the uncertainty of this mortal life, and being of weak body, but of perfect mind and memory, blessed be Almighty God for the same, do make and publish this my last Will and Testament, in manner and form following, that is to say:

First. I request my executrix and executor, hereafter named, to take *up*, themselves, the settlement of all my affairs, receive all debts due to me, pay my funeral expenses and all my debts.

Second. I give and bequeath all my estate, real and personal, to my wife and children, to be divided among them, according to the laws of Maryland, the same manner as if I had not made a will.

Lastly. I hereby appoint my wife, Aglae Coursault, executrix, and my brother-in-law, Mr. Gabriel Paul, of Philadelphia, executor, of this my last will and testament, and hereby revoking all former wills by me made.

In testimony whereof I have hereunto set my hand and seal, at Baltimore, this thirteenth day of August, in the year of our Lord one thousand eight hundred and fourteen.

E. COURSAULT. [SEAL.]

Signed, sealed, published, and declared by the above named Edward Coursault, to be his last will and testament, in the presence of us, who have hereunto subscribed our names as witnesses, in the presence of the testator.

JNO. GILL, *Notary Public.*
ANNETTE PREVETORY,
E. FE. GENERELLY,
SOPHIE MARECHAL.

BALTIMORE COUNTY, *ss.*

On this 27th day of August, 1814, came E. fe. Generelly, one of the subscribing evidences to the aforegoing last will and testament of Edward Coursault, late of said county, deceased, and made oath on the Holy Evangely of Almighty God, that she did see the testator sign and seal this will; that she heard him publish, pronounce, and declare the same to be his last will and testament; that at the time of his so doing he was, to the best of her apprehension, of sound, disposing mind, memory and understanding; and that she, John Gill, Annette Provertory, and Sophie Marechal, the other subscribing witnesses, subscribed their names as witnesses to this will, in his presence, at his request, and in the presence of each other.

Sworn to in open court.

Test: WM. BUCHANAN, *Register.*

In testimony that the aforegoing is a true copy, taken from Wills, Liber W. B. No. 9, folio 480, &c., being one of the records in the office of the register of wills for Baltimore county,

I hereunto subscribe my name, and affix the seal of my [SEAL.] office, this sixth day of October, in the year of our Lord eighteen hundred and thirty-eight.

Test: D. M. PERINE,
Register of Wills for Baltimore County.

MARYLAND, *sct.*

I, James Harwood, presiding justice of the orphans' court for Baltimore county, in the State aforesaid, do certify, that the aforegoing attestation of David M. Perine, register of wills for said county, is in due form, and by the proper officer.

Given from under my hand at the city of Baltimore, this sixth day of October, in the year of our Lord one thousand eight hundred and thirty-eight.

JAMES HARWOOD.

MARYLAND, *sct.*

To all persons to whom these presents shall come, greeting:

Know ye, that the last will and testament of Edward Coursault, late of Baltimore county, deceased, hath in due form of law been exhibited, proved and recorded in the office of the register of wills for Baltimore county, a copy of which is to the presents annexed; and administration of all the goods, chattels, and credits of the deceased is hereby granted and committed unto Gabriel Paul, the executor of the said will appointed.

Witness, Owen Dorsey, Esquire, chief judge of the orphans' court [SEAL.] for Baltimore county, this 27th day of August, 1814.

Test: WM. BUCHANAN, *Register.*

Power of attorney from Gabriel Paul to Aglae E. Coursault, and a memorandum of the award by the French commissioners, referred to in exceptions, page , to wit:

UNITED STATES OF AMERICA.—DEPARTMENT OF STATE.

To all whom these presents shall come, greeting:

I certify that the document hereunto annexed, containing a power of attorney from Gabriel Paul to Anglae E. Coursault, and a memorandum of an award by the commissioners, under the convention with France, in 1831, is a true copy of the original, which is on file in this department.

In testimony whereof, I, John Forsyth, Secretary of State of the United States, have hereunto subscribed my name, [SEAL.] and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this twelfth day of January, A. D. 1839, and of the Independence of the United States of America the 63d.

JOHN FORSYTH.

Br. Good Friends.—Harlow.

Vessel, &c.,	- - - - - -	$4,000
Freight, &c.,	17½ com. - - - -	3,372
Cargo,	cov. at 17½ - - -	32,389
Expenses, -	- - - - - -	1,269
		$41,030

Distribution.

No. 462, E. G. Dutilk, Adm'x, *See Note*,		$8,201 14
" 463, G. Paul,		8,354 20
" 460, Edward Coursault's Ex'x,		
to wit: A.	3,000	
F.	2,529	
C.	7,770	
Exp.	461 22	$13,760 22
" 722, J. S. Duvall, - - - -		6,196 46
" 907, D. W. Cox, - - - -		4,517 98
		$41,030 00

" 2832, No proof of payment. Not allowed.

As the invoices in Nos. 462 and 460 charge for insurances, and as a conditional insurance was effected in No. 462, and no payment was received on it, the parties in their Nos. will be required to furnish satisfactory explanations, that nothing was received on foreign insurances, therefore disallowed.

No. 6. 183.	R. M. S.	462, 466	Reconsidered and disallowed.
	J. K. K.	2832	
" 460, E. Coursault, Ex'x, - -			$13,760 22
" 462, E. J. Dutilk, Adm'r, - -			8,201 14
			$21,961 36

Allowed 20th December, 1835.
R. M. S.
J. K. K.

Brig Good Friends.—Harlow.
Allowance, - - - - - $19,068 64.

SAUNDERS & KANE.

Power of Attorney from G. Paul, to Mrs. Aglae E. Coursault.

I, Gabriel Paul, of the city of St. Louis, county of St. Louis, State of Missouri, empower Mrs. Aglae E. Coursault, widow of the late Edward Coursault, merchant of Philadelphia, and owner of the Brig Good Friends, Captain Winslow Harlow, to present in my name, as administrator of the estate of said E. Coursault, the claim of said E. Coursault, for the confiscation, by the French Government, of the Brig Good Friends and her cargo, in the port of Morlaix, in France, on the 30th of October, 1810. Promising besides, that I will present

myself before the Board of Commissioners appointed to settle those claims as soon as it will be required.

Done at St. Louis, this 18th day of October, 1832.

G. PAUL, [SEAL.]

STATE OF MISSOURI, COUNTY OF ST. LOUIS, *ss:*

Personally appeared before the subscriber, a justice of the peace within and for the county of St. Louis, Gabriel Paul, who acknowledged the above instrument of writing or power of attorney to be his act and deed, for the purposes therein mentioned.

Given under my hand this 23d day of October, 1832.

J. C. GARNER, *J. P.*

Memorial of Aglae Coursault, referred to in the preceding bill of exceptions, page .

UNITED STATES OF AMERICA, *Department of State.*

To all to whom these presents shall come, greeting:

I certify that the document hereunto annexed is a true copy of the memorial of Aglae Coursault, in the case of the Brig Good Friends, taken from the papers of the commissioners under the Convention with France of July 4th, 1831, and now on file in this department.

In testimony whereof, I, John Forsyth, Secretary of State of the United States, have hereunto subscribed my name, and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this sixteenth day of May, [SEAL.] A. D. 1839, and of the Independence of the United States of America the sixty-third.

JOHN FORSYTH.

Memorial.

To the Honorable the Board of Commissioners, appointed under the Act of Congress, on the thirteenth day of July, 1832, to carry into effect the convention between the United States of America, and His Majesty, the King of the French, concluded at Paris, on the 4th day of July, 1831.

The memorial of Aglae Coursault, of the city of Baltimore, widow and executrix of the last will and testament of Edward Coursault, late of said Baltimore, merchant, deceased, who in his lifetime was a citizen of the United States of America, by naturalization, and domiciled in the city of Baltimore, respectfully represents:

That the said Edward Coursault, in the month of December, A. D. 1809, who then was a citizen of the United States of America, by naturalization, and domiciled at Philadelphia, was the true and lawful owner of a brig or vessel called the Good Friends, Winslow Harlow, Master, a registered vessel of the United States, and also a part of the cargo on board, consisting of five hogsheads of tobacco, twenty bales of cotton, ten seroons of bark, twenty tierces of rocoe,

five hogsheads of cassia; seventeen boxes of white sugar; five bags of coffee; thirty-six bags of gum; fourteen and a half tons of logwood; and one and a half tons of fustic.

That the said vessel, with her cargo on board, sailed from the port of Philadelphia, bound to Tonningen; and, on her voyage, proceeding to her port of destination, experienced great distress of weather, and was compelled, by necessity, to put into Morlaix, in France: that a survey of said vessel was had after she had put into port; and the surveyors reported that she had put in in distress, and was unfit to proceed to sea.

That, after the said vessel arrived at Morlaix, both vessel and cargo were seized, under the authority of the French government, without any just or lawful ground or pretence whatever; and, by a decree of his Imperial Majesty himself, were confiscated and sold, and, by means thereof, the said vessel and cargo were totally lost to their said owner.

That the said brig, at the time of her departure from Philadelphia, was of the value of five thousand and forty-seven dollars and eighty-one cents: that the value of her freight, as by the freight list, was four thousand four hundred and twenty-four dollars and seventy-one cents; and that the cargo shipped by the said Edward Coursault, on his account, was of the value of nine thousand and one dollars and thirty cents, including premium of insurance; as may fully appear by the documents herewith submitted to the board.

That, during the detention of said brig and cargo, until the condednation and sale thereof, great expenses were incurred by the sa i Edward Coursault, in his endeavour to defend his rights in the same, and to obtain restoration therefor, the particulars of which will be submitted in proof to the board.

That the said Edward Coursault is deceased; and that before his death he made his last will and testament, bearing date the thirteenth day of August, A. D. 1814, and which, after his death, was duly proved before the register of wills for the county of Baltimore; and therein and thereby appointed your memorialist, executrix, and Gabriel Paul, executor thereof; and that letters testamentary were granted to your memorialist and the said Gabriel Paul; and that your memorialist then was, and still is, domiciled at the city of Baltimore.

That, in support of this claim, your memorialist refers to the documents which will be herewith submitted to the board.

Your memorialist further declares, that no indemnification whatever has ever been received, either from France or from any other source, for said claim or any part thereof; and that no other person was, at the time of the origin of said claim, nor at any time since been, nor now is, interested in the said claim, or any part thereof, except the said Edward Coursault, and your memorialist and the said Gabriel Paul, as executors, as aforesaid; and that whatever amount of said claim may be awarded under said convention, will belong solely and exclusively to your memorialist, as executor of the last will and testament of the said Edward Coursault, deceased.

Your memorialist therefore prays, that the said claim may be admitted for the aforesaid sum of five thousand and forty-seven dollars, eighty-one cents, the value of the vessel; four thousand four hundred and twenty-four dollars and seventy-one cents, the value of the freight, and nine thousand and one dollars and thirty cents, the value of said cargo, together with the expenses of prosecuting the said claim, as well as interest and damages thereon.

AGLAE VA. E. COURSAULT.

STATE OF MARYLAND, *Baltimore City, to wit:*

On this fifteenth day of January, in the year of our Lord one thousand eight hundred and thirty-three, before the subscriber, a justice of the peace in and for the city of Baltimore aforesaid, personally appeared Aglae V. E. Coursault, who, being duly sworn according to law, did declare and say, that the facts, circumstances, and allegations stated in the said memorial, so far as they have come within her knowledge, are true as stated; and that those stated, as derived from the knowledge of others, she believes to be true.

Witness my hand and seal the same day and year.

WILLIAM WARFIELD.

Houston's Certificate.

Jno. H. Houston's certificate, referred to in the preceding bill of exceptions—page .

TREASURY DEPARTMENT,
Fifth Aud'r's Office, 19*th April*, 1839.

Under the awards made by the commissioners, appointed under the act of Congress to carry into effect the convention between the U. S. and the king of the French, of the 4th of July, 1831, there has been paid to Elias Kane, Esq., or his representative, as adm'r de bonis non of Edward Coursault, the rates of $57\frac{1520}{10000}$ per centum, on the sum of $\$13{,}760\frac{32}{100}$ dollars, amounting to $\$7{,}864\frac{33}{100}$; and there was due, the ratio of $2\frac{2145}{10000}$ per cent., amounting to $304\frac{72}{100}$ dollars, for the arrears of interest on the four first instalments, which, I presume, has been paid, but of which fact we have no evidence in this office.

JNO. H. HOUSTON, *Cl'k F. A. Of.*

Test: W. BRENT, *Cl'k.*

Clerk's Certificate.

And whereas, afterwards, to wit: on day of in the year of our Lord one thousand eight hundred and thirty-nine, the said defendant, by his attorney aforesaid, produced, and filed in court here, the United States writ for the correcting of errors of and upon the judgment aforesaid, directed to the judges of the circuit

court of the District of Columbia, in the county of Washington; and, in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is hereby transmitted to the said Supreme Court accordingly.

In testimony whereof, I have hereunto subscribed my [SEAL.] name and affixed the seal of the said circuit court, for the county aforesaid, this sixteenth day of August, 1839.

W. BRENT, *Cl'k.*

468.

SUPREME COURT OF THE UNITED STATES.

No. 43.

LESSEE OF WILLIAM POLLARD'S HEIRS, PLAINTIFF IN ERROR,

vs.

GAIUS KIBBE.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF ALABAMA.

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Langtree & O'Sullivan, Print.

1682.

THE UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Judges of the Supreme Court of the State of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which in our Supreme Court, before you, or some of you, between John Goodtitle, *ex dem.* of Pollard's heirs, is plaintiff in error, and Gaius Kibbe is defendant, manifest error hath intervened, to the great damage of the said John Goodtitle, *ex dem.* of Pollard's heirs, as by his complaint we are informed. We being willing that error, if any there be, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, command you, if judgment be thereupon given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected by the said Supreme Court, we may cause to be further done thereupon to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, the second Monday of January, A. D. 1839, and of the Independence of the United States the sixty- year.

Witness James B. Wallace, clerk of said Supreme Court of Alabama, and the seal of said Court, this day of , 1839.

JAMES B. WALLACE, *Clerk.*

We, the undersigned, who were of counsel for the within named Gaius Kibbe, in the within named cause, in the circuit court of Baldwin and Mobile counties, and also in the supreme court of Alabama, do hereby acknowledge to have received notice of the issuance of the within writ of error, and service of the citation hereto annexed, and we do waive the necessity of the signature of a judge to the said citation.

Given under our hands at Mobile this 25th day of November, 1839.

J. A. CAMPBELL,
STEWART & EASTON.

The United States of America to Gaius Kibbe, or John A. Campbell, or George N. Stewart, his attorneys, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the Monday in January next, pursuant to a writ of

error filed in the clerk's office of the supreme court of the State of Alabama, wherein John Goodtitle, *ex dem.* of Pollard's heirs, is plaintiff in error, and Gaius Kibbe is defendant in error, to show cause, if any there be, why the judgment rendered against the said John Goodtitle, *ex dem.* &c., as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, the day of , in the year of our Lord 1839, and of the Independence of the United States the sixty year.

Attest: JAMES B. WALLACE,
Clerk of the Supreme Court of Alabama.

County, *ss.*

On this day of , in the year of our Lord 1839, personally appeared me , and being duly sworn, deposeth and saith, that on the day of he delivered a true copy of the above citation to .

Be it remembered, that heretofore, to wit, at the June term of the supreme court of the State of Alabama, begun and held at the capitol of said State, in the city of Tuscaloosa, on the first Monday in June, Anno Domini 1839, and on the 22d of said month of June, (present, the Hon. Henry W. Collier, chief justice, and the Hon. John J. Ormond, associate justice,) certain pleas in error were heard and determined, in the case wherein the heirs of William Pollard were plaintiffs, and Gaius Kibbe was defendant; all of which pleas and proceedings are in the words and figures following, to wit:

[On the 24th day of December, A. D. 1838, there were filed in the said supreme court a writ of error and transcript of record, as now first follow, viz:]

The State of Alabama to the clerk of the circuit court of Baldwin county:

Because in the record and proceedings, and also in the giving of judgment in a certain action of ejectment late pending in the circuit court of Baldwin county, before the Hon. E. Pickens, wherein John Goodtitle, on the demise of John Pollard, William Pollard, John Fowler, and Harriet, his wife, late Harriet Pollard, Henry P. Ensign, and Phœbe, his wife, late Phœbe Pollard, George Huggins, and Louisa, his wife, late Louisa Pollard, Joseph Case, and Eliza, his wife, late Eliza Pollard, is plaintiff, and Gaius Kibbé is defendant, manifest error hath intervened to the great damage of the plaintiff, as we, from his complaint, are informed. We being willing that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done between the parties aforesaid in this behalf, do command you, that if judgment thereof be given,

then under your seal do you, openly and distinctly, send the record and proceedings in the action aforesaid, and all things concerning them, and this writ, so that they may have them before *before* the Supreme Court at Tuscaloosa, on the first Monday of January, one thousand eight hundred and thirty-nine, that the record and proceedings aforesaid being inspected, we may cause to be further done *therefore* for correcting that error, what of right and according to law ought to be done.

Witness William H. Gasque, clerk of our circuit court of Baldwin county, this fifth day of December, 1838.

W. H. GASQUE, *Clerk.*

At a circuit court begun and held in and for the county of Mobile, on the second Monday after the fourth Monday of October, in the year 1837:

JOHN GOODTITLE, ex demise of John Pollard, Wm. Pollard, John Fowler, and Harriet, his wife, Henry P. Ensign, and Phœbe, his wife, George Huggins, and Louisa, his wife, and Joseph Case, and Eliza, his wife, *Plaintiffs*,

vs.

RICHARD SHAMTITLE, *Defendant.*

In this cause a motion was made to change the venue, which motion, after being heard and considered, it is ordered that the venue of the same be changed to the county of Baldwin.

THE STATE OF ALABAMA, *Mobile County.*

I, Malcolm J. McRae, clerk of the circuit court of Mobile county, in the State aforesaid, do hereby certify that the foregoing eight orders are copies from the minutes of the said circuit court, and that the within closed papers are the original papers in said causes.

In testimony whereof I have hereunto set my hand, and caused the seal of said court to be hereunto annexed, this 28th day of March, in the year one thousand eight hundred and thirty-eight.

[SEAL.]

M. J. McRAE, *Clerk.*

THE STATE OF ALABAMA, *Baldwin County.*

I, William H. Gasque, clerk of the circuit court of said county, do certify that the above embraced is as one of the eight orders above referred to.

Given under my hand and private seal (there being no seal of court) this fifth day of December, A. D. 1838.

W. H. GASQUE, *Clerk.*

THE STATE OF ALABAMA, *Mobile County*.

Circuit Court, November Term, 1837.

Richard Shamtitle, late of Mobile county, was attached to answer John Goodtitle of a plea whereof with force and arms he entered into a messuage, or lot of land, with the appurtenances, situate in the county and city of Mobile, which John Pollard, William Pollard, John Fowler, and Harriet, his wife, late Harriet Pollard, Henry P. Ensign, and Phœbe, his wife, late Phœbe Pollard, George Huggins, and Louisa, his wife, late Louisa Pollard, Joseph Case, and Eliza, his wife, late Eliza Pollard, demised to the said John Goodtitle for a time which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said John Goodtitle, and against the peace and dignity of the State of Alabama.

And whereupon the said John Goodtitle, by his attorney, George F. Salle, complains that, whereas the said John Pollard, Wm. Pollard, John Fowler, and Harriet, his wife, Henry P. Ensign, and Phœbe, his wife, George Huggins, and Louisa, his wife, Joseph Case, and Eliza, his wife, (which said John Pollard, William Pollard, Harriet, Phœbe, Louisa, and Eliza, are the heirs at law of William Pollard, deceased,) on the 15th day of March, one thousand eight hundred and thirty-seven, at the city aforesaid, and county aforesaid, had demised to the said John Goodtitle the said messuage or lot of land lying in the city of Mobile, bounded on the north by the south boundary of what was originally designated as John Forbes & Co's. canal; on the west by Water street; on the east by a lot in the occupancy of, or claimed by Bartlett and Waring; and on the south by what is now called Government street: To have and to hold the said messuage or lot of land, with the appurtenances, unto the said John Goodtitle and his assigns, from the said 15th day of March, one thousand eight hundred and thirty-seven, to the end and term of fourteen years from thence next ensuing, to be complete and ended. By virtue of which said demise the said John Goodtitle entered into the said messuage or lot of land, and was thereof possessed; and being so possessed thereof, the said Richard Shamtitle afterwards, to wit, on the 17th day of March, in the year aforesaid, with force and arms, so entered into the said messuage or lot of land which the said lessors demised to the said John Goodtitle, in form aforesaid, and for the term aforesaid, which is not yet expired, and ejected the said John Goodtitle out of his said farm, and other wrongs to him did, to the great damage of the said John Goodtitle, and against the peace and dignity of the State of Alabama, whereby the said John Goodtitle saith that he is injured and damaged to the value of fifteen thousand dollars, and therefore he brings suit, &c.

Mr. GAIUS KIBBE:

I am informed that you are in possession of, or claim title to the premises mentioned in this declaration of ejectment, or to some part

thereof; and I being sued in this action as casual ejector, and having no claim or title to the same, do advise you to appear at the next term of the circuit court of Mobile county, to be holden on the second Monday after the fourth Monday of October, one thousand eight hundred and thirty-seven, by some attorney of that court, and then and there, by a rule to be made of the same court, to cause yourself to be made defendant in my stead: otherwise I shall suffer judgment to be entered against me by default, and you will be turned out of possession.

Yours, &c.,
RICHARD SHAMTITLE.

August, 2d, 1837.

It is ordered, by the consent of the attornies for both parties, that Gaius Kibbe be made a defendant instead of the now defendant, Shamtitle, and do forthwith appear at the suit of the plaintiff, and receive a declaration in ejectment for the premises in question, and forthwith plead thereto not guilty, and upon the trial of the issue confess lease, entry, and ouster, and insist upon the title only; otherwise let judgment be entered for the plaintiff against the now defendant, Shamtitle, by default. And if, upon the trial of the said issue, the said Kibbe shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the said Kibbe, then no costs shall be allowed for not further prosecuting the same; but the said Kibbe shall pay costs to the plaintiff in that case to be taxed.

And it is further ordered, that if, upon the trial of the said issue, a verdict shall be given for the said Kibbe, or it shall happen that the plaintiff shall not further prosecute his said writ for any other cause than for not confessing lease, entry, and ouster, then the lessors of the plaintiff shall pay to the said Kibbe costs in that case to be adjudged.

GEO. F. SALLE,
Attorney Plaintiff.

Received and executed the 8th September, 1837, by delivering a copy of the within writ to Gaius Kibbe.

WM. MAGEE,
Sheriff Mobile County.
By M. J. D. BALDWYN,
Deputy Sheriff.

M. J. D. Baldwyn being duly sworn deposeth and says, that on the 8th September, 1837, he did, personally, serve on Gaius Kibbe, the defendant in this suit, who is the actual occupant of the premises for which this action is brought, a true copy of the declaration hereto annexed, and also a true copy of the notice in writing to the said declaration subjoined, and hereto annexed.

M. J. D. BALDWYN.

Sworn to and subscribed before me this 27th of March, 1838.

CHARLES A. HENRY,
Justice of the Peace Mobile County.

March, 1838.

THE STATE OF ALABAMA, *Mobile County*.

Circuit Court, November Term, 1837.

Gaius Kibbe, late of Mobile county, was attached to answer John Goodtitle of a plea whereupon, with force and arms, he entered into a messuage, or lot of land, with the appurtenances, situate in the county and city of Mobile, which John Pollard, William Pollard, John Fowler, and Harriet, his wife, late Harriet Pollard, Henry P. Ensign, and Phœbe, his wife, late Phœbe Pollard, George Huggins, and Louisa, his wife, late Louisa Pollard, Joseph Case, and Eliza, his wife, late Eliza Pollard, demised to the said John Goodtitle, for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Goodtitle, and against the peace and dignity of the State of Alabama. And whereupon the said John Goodtitle, by his attorney, George F. Salle, complains that, whereas the said John Pollard, William Pollard, John Fowler, and Harriet, his wife, Henry P. Ensign, and Phœbe, his wife, George Huggins, and Louisa, his wife, Joseph Case, and Eliza, his wife, (which said John Pollard, William Pollard, Harriet, Phœbe, Louisa, and Eliza, are the heirs at law of William Pollard, deceased,) on the 15th day of March, one thousand eight hundred and thirty-seven, at the city aforesaid, and county aforesaid, had demised to the said John Goodtitle the said messuage, or lot of land, lying in the city of Mobile, bounded on the north by the south boundary of what was originally designated as John Forbes & Co's. Canal; on the west by Water street; on the east by a lot in the occupancy of, or claimed by, Bartlett & Waring; and on the south by what is now called Government street: To have and to hold the said messuage, or lot of land, with the appurtenances, to the said John Goodtitle, and his assigns, from the said fifteenth day of March, one thousand eight hundred and thirty-seven, to the end and term of fourteen years from thence next ensuing, to be complete and ended. By virtue of which said demise, the said John Goodtitle entered into the said messuage, or lot of land, and was thereof possessed; and, being so possessed thereof, the said Gaius Kibbe afterwards, to wit, on the seventeenth day of March, in the year aforesaid, with force and arms, entered into the said messuage, or lot of land, which the said lessors demised to the said John Goodtitle in form aforesaid, and for the term aforesaid, which is not yet expired, and ejected the said John Goodtitle out of his said farm, and other wrongs to him did, to the great damage of the said John Goodtitle, and against the peace and dignity of the State of Alabama; whereby the said John Goodtitle saith that he is injured and damaged to the value of fifteen thousand dollars, and therefore he brings suit, &c.

GEO. F. SALLE,
Attorney Plaintiff.

JOHN GOODTITLE, ex dem. of Wm. Pollard's heirs, *vs.* RICHARD SHAMTITLE. } Baldwin county Circuit Court, April Term, 1838.

Gaius Kibbe, by his attorney, comes and defends the force and injury when, &c.; prays to be made defendant in this cause in lieu of the casual ejector; confesses lease, entry, and ouster; insists on the title only; and, for plea, says he is not guilty in manner and form as the plaintiffs have thereof alleged against him, and of this he puts himself upon the country.

GORDON, CAMPBELL, & CHANDLER,
STEWART, THORNTON, & EASTON,
Attorneys Defendant.

From the Trial Docket, April Term, 1838.

Salle & Test. *No.* 40. *G. C. & C.*

JOHN GOODTITLE, ex dem. of the heirs of Wm. Pollard, *vs.* RICHARD SHAMTITLE. } By consent, a juror withdrawn. Mis-trial.

From the Trial Docket, October Term, 1838.

Salle & Test. *No.* 17. *G. C. & C. S. & T.*

THE SAME, *vs.* THE SAME. } Verdict—Not guilty.

From the Minutes of October Term, 1838.

THE SAME, *vs.* THE SAME.

Came the parties, by their attorneys, and thereupon came a jury of twelve good and lawful men, to wit, David Mims, and eleven others, who, after being duly elected, tried, and sworn, to well and truly try the issue joined between the parties, and a true verdict give, according to the evidence upon their oaths, do say: We, the jury, find the defendant not guilty, as charged in the plaintiffs' declaration. It is therefore considered by the court, that the defendant go hence and recover of the plaintiffs his costs of suit in this behalf expended.

EZEKIEL PICKENS, *Judge.*

THE STATE OF ALABAMA:

Baldwin County Circuit Court, Fall Term, 1838.

JOHN GOODTITLE, on the demise of John Pollard, William Pollard, et al. *against* GAIUS KIBBE, the tenant in possession.

Ejectment. The venue of which cause was changed to the county of Baldwin.

On the trial of this cause at the above term, the plaintiffs, to maintain the issue on their part, gave in evidence an instrument signed by Cayetano Perez, written in the Spanish language, a translation of which is hereto annexed as a part of this bill of exceptions, but which instrument was shown to have been reported against, and rejected by, the Commissioners appointed by the United States Government to investigate and report on such matters, because of the want of improvement and occupancy. They further gave in evidence an act of Congress, passed on the 26th day of May, 1824, entitled an act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals of said city. They further gave in evidence an act of Congress, passed July the second, A. D. 1836, entitled an act for the relief of William Pollard's heirs. They then gave in evidence a patent, dated the 14th day of March, A. D. 1837, issued in pursuance of said act of Congress of the 2d of July, A. D. 1836, which patent embraced the premises in question. The plaintiffs further proved that, in the year 1813 or 1814, some wreck and drift wood was removed from the place where the premises in question now are, by the hands of William Pollard, the grantee. The defendant gave in evidence a Spanish grant, dated 9th of June, 1812, to John Forbes & Co. for a lot of ground, for eighty feet front on Royal street, with a depth of 304 feet to the east, and bounded on the south by Government street; which grant was recognized as a perfect title, and so confirmed by act of Congress. Attached to the original grant was a certificate signed W. Barton, Register, Wm. Barnett, Receiver, P. M.: Attest, John Elliott, Clerk—a copy of which is hereunto attached as a part of this bill.

A map, or diagram, indicating the property claimed, as well as that covered by the above grant, with other lots, streets, &c., was submitted to the jury, and is intended, when taken to the Supreme Court, to make a part of this bill; and an agreement to that effect has been written on the same, and signed by Geo. F. Salle, Esq., counsel for plaintiffs, and Messrs. Thornton and Gordon, for defendant. According to that map and the proof, the lot sued for is east of Water street, and also immediately in front of the lot conveyed by the above mentioned grant to John Forbes & Co., and only separated from it by Water street. The proof showed that, previous to

1819, then, and until filled up, as after stated, the lot claimed by plaintiffs was, at ordinary high tide, covered with water, and mainly so at all stages of the water; that the ordinary high water flowed from the east to about the middle of what is now Water street, as indicated on the map referred to, between the lot claimed by plaintiffs, and that covered by the grant to John Forbes & Co. It was proved that John Forbes & Co. had been in possession of the lot indicated by their deed since the year 1802, and that said lot was known under the Spanish Government as a water lot—no lots at that time existing between it and the water.

It was proved that, in the year 1823, no one being then in possession, and the same being under water, Curtis Lewis, without any title, or claim under title, took possession of, and filled up, east of Water street, and from it 80 feet east, and 36 or 40 feet wide—filling up north of Government street, and at the corner of the same, and Water street; that Lewis remained in possession about nine months, when he was ousted in the night by James Innerarity, one of the firm of John Forbes & Co., who caused to be erected a smith shop, and from whom Lewis, sometime after, regained the possession by legal process, and retained it till he conveyed the same. Proved that when said Lewis took possession, Water street at that place could be passed by carts, and was common. The defendant connected himself, through conveyances for the premises, in controversy with the said grant to John Forbes & Co.; also, with the said Curtis Lewis; also, with the mayor and aldermen of the city of Mobile: from each of which sources his title, if any, was derived by deed.

It was admitted by the parties to the suit, that the premises sued for were between Church street and North Boundary street; this was all the evidence introduced on the trial.

On this evidence, the court charged the jury that if the lot conveyed as above to John Forbes & Co., by the deed aforesaid, was known as a water lot under the Spanish government, and if the lot claimed by the plaintiffs had been improved at, and previous to, the twenty-sixth day of May, 1824, and was east of Water street, and immediately in front of the lot so conveyed to John Forbes & Co., then the lot claimed passed, by the act of Congress of the 26th of May, 1824, to those at that time owning and occupying the lot so as above conveyed to John Forbes & Co.

The court further charged the jury it was immaterial who made the improvements on the lot on the east side of Water street, being the one in dispute; that, by the said act of Congress, the proprietor of the lot on the west side of Water street, known as above, was entitled to the lot on the east side of it. To which charges of the court, the plaintiffs, by their counsel, excepted, and this is signed and sealed as a bill of exceptions.

EZEKIEL PICKENS. [SEAL.]

Translation from the Spanish.

MR. COMMANDANT:

William Pollard, an inhabitant of this district, before you, with all respect, represents: That, as he has a mill established upon his plantation, and that he often comes to this place with planks and property from it, and that he wishes to have a place propitious, or suitable, for the landing and safety thereof, and that having found a vacant piece at the river side between the channel which is called John Forbes & Co. and the wharf of this place, he petitions to grant him said lot on the river bank to give more facility to his trading—a favor he hopes to obtain of you.

WILLIAM POLLARD.

Mobile, 11th Dec'r, 1809.

MOBILE, 12th of Dec'r, 1809.

I grant the petitioner the lot or piece of ground he prays for on the river bank, provided it be vacant.

CAYETANO PEREZ.

LAND OFFICE, AUGUSTA, MI., February 2d, 1832.

We certify that the foregoing is a correct transcript from the record, as recorded in book B, page (424) four hundred and twenty-four. Given under our hands and private seals, we having no seals of office.

WM. HAUSE, *Reg'r.* [SEAL.]
G. B. DOMISON, *Receiver.* [SEAL.]

Original deed endorsed: Translated and recorded in book B, page 424.

ED. KINGSLY, *Clerk.*

Translated and entered on page 3 of record, May 19th, 1827.
G. SALTONSTALL, *Clk.*

L. Judson, being duly sworn before the board, states he is neither directly nor indirectly interested in the claim, (in support of which, the above grant from Perez is introduced,) and that, to the best of his knowledge and belief, the above is a genuine signature of Cayetano Perez.

G. SALTONSTALL, *Clk to the Board.*

December 22d, 1827.

LAND OFFICE, JACKSON COURT-HOUSE.

Commissioner's Report No. 2—Certificate No. 3.

In pursuance of the act of Congress, passed on the 3d of March, 1819, entitled "An act for adjusting the claims to land, and establishing land offices in the districts east of the island of New Orleans,"

we certify that claim No. 3, in the report of the commissioners numbered 2, (claimed by John Forbes & Co., original claimant, Panton Leslie & Co.) is recognized by the said act as valid against any claim on the part of the United States, or right derived from the United States; the said claim being for 80 feet in front, and 304 in depth, area 24,320 feet, situate in the town of Mobile, and claimed by virtue of a Spanish grant executed by J. V. Morales, and dated 9th of June, 1802. Given under our hands this eighth day of January, 1820.

W. BARTON, *Register.*
WM. BARNETT, *Receiver, P. M.*
Attest: JOHN ELLIOTT, *Clerk.*

THE STATE OF ALABAMA, *Baldwin County.*

I, William H. Gasque, clerk of the circuit court of said county, do hereby certify that the foregoing contains a full and complete transcript from the records of my office of the cause herein set forth.

Given under my hand and private seal, (there being no seal of office) this fifth day of December, one thousand eight hundred and thirty-eight.

W. H. GASQUE, *Clerk.* [SEAL.]

Citation.

THE STATE OF ALABAMA, *Baldwin County Circuit Court.*

To the Sheriff of Mobile county, Greeting:

Whereas, at a term of the circuit court of Baldwin county, held on the first Monday after the fourth Monday of October, 1838, in a certain cause in said court wherein John Goodtitle, ex dem. of John Pollard, William Pollard, John Fowler, and Harriet, his wife, late Harriet Pollard, Henry P. Ensign, and Phœbe, his wife, late Phœbe Pollard, George Huggins, and Louisa, his wife, late Louisa Pollard, Joseph Case, and Eliza, his wife, late Eliza Pollard, is plaintiff, and Gaius Kibbe is defendant, a judgment was rendered against the said plaintiff; to reverse which, the said plaintiff has, on this day, applied for, and obtained from this office, a writ of error, returnable to the next term of our Supreme Court of the State of Alabama, to be held at Tuscaloosa on the first Monday of January next. Now you are hereby commanded, without delay, to cite the said Gaius Kibbe, or Henry J. Thornton and R. G. Gordon, attorneys, to appear at the next term of our said Supreme Court, to defend against the said writ of error if they think proper.

Witness William H. Gasque, clerk of the circuit court of said county, this fifth day of December, 1838.

Attest: W. H. GASQUE, *Clerk.*

On said citation, the following endorsement appears: "Executed a copy of the within notice on R. G. Gordon, the 10th Dec'r, 1838.

W. MAGEE, *Sh'ff Mo. Co.*
By J. D. BALDWIN, *Dept. Sh'ff.*"

Upon which said writ of error and transcript of record, the following proceedings were had:

Assignment of Errors.

JOHN GOODTITLE, ex dem. of John Pollard, et al. *vs.* GAIUS KIBBE. } In Error. Assignment of Errors.

And the said plaintiff, by his attorney, comes, on this first Monday in January, one thousand eight hundred and thirty-nine, at Tuscaloosa, and says, that there is error in the record and proceedings in the judgment of the said circuit court in this, to wit: That the judgment of the said court should have been in favor of the plaintiffs below, and not in favor of the defendants, and this he is ready to verify; wherefore he prays that the judgment of the said court may be reversed, annulled, and nothing had.

GEO. F. SALLE,
Attorney Plaintiffs.

There is no error in the record.

GORDON, CAMPBELL, & CHANDLER,
STEWART, THORNTON, & EASTON,
Attorneys for Kibbe.

[Advisare and continuance in the Supreme Court of Alabama, at the January term thereof, A. D. 1839.]

JOHN GOODTITLE, on dem. of John Pollard, et al., *vs.* GAIUS KIBBE. } 1285. Goldthwaite, J. not sitting.

Because the court would further consider of the matters of law arising in this case, day is given until the next term of this court.

[Judgment of the Supreme Court of Alabama, at the June term thereof, A. D. 1839.]

JOHN GOODTITLE, on dem. of John Pollard, et al., *vs.* GAIUS KIBBE. } 1285.

This day came said parties, by their attorneys, and thereupon the record in this cause, and the matters assigned for error therein being argued and examined, it seems to this court that, in the record and proceedings of said circuit court, there is no error: Therefore, it is considered that said judgment of said circuit court be affirmed; and that the said Gaius Kibbe recover of said John Pollard, William Pollard, John Fowler, and Harriet, his wife, Henry P. Ensign,

and Phœbe, his wife, George Huggins, and Louisa, his wife, Joseph Case, and Eliza, his wife, the costs of this cause in this court and in said circuit court.

I, James B. Wallace, clerk of the Supreme Court of the State of Alabama, certify that the foregoing is a full and correct transcript of the record, diagrams, and papers of said court, in the case wherein the heirs of William Pollard were plaintiffs, and Gaius Kibbe was defendant.

In testimony whereof, I hereunto set my hand and affix the seal of office the 23d day of July, anno Domini, one thousand [SEAL.] eight hundred and thirty-nine, and of the Independence of the United States of America the sixty-fourth year.

JAMES B. WALLACE, *Clerk.*

476.

SUPREME COURT OF THE UNITED STATES.

No. 44.

GEORGE HOLMES, PLAINTIFF IN ERROR,

vs.

SILAS H. JENNISON, *Governor of the State of Vermont*, and JOHN STARKWEATHER, *Sheriff of the County of Washington, in said State of Vermont, and their Successors in Office.*

IN ERROR TO THE SUPREME COURT OF JUDICATURE OF THE STATE OF VERMONT.

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Langtree & O'Sullivan, Print.

SUPREME COURT OF THE UNITED STATES.

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Langworthy & O'Sullivan, Print.

UNITED STATES OF AMERICA, *Vermont District, to wit:*

The President of the United States to the Justices of the Supreme Court of Judicature of the State of Vermont, greeting:

Because, that in the record and proceedings, as also in the rendering of judgment in a suit before you, or some of you, upon a writ of habeas corpus, prayed out of the said supreme court of judicature by George Holmes, to be relieved from arrest and imprisonment, under a warrant or order signed by his Excellency Silas H. Jennison, as Governor of said State of Vermont, directing the surrender of the said George Holmes to the authorities of the British Province of Lower Canada, and by virtue of which warrant he is detained as a prisoner by John Starkweather, Esquire, sheriff of the county of Washington, in said State of Vermont, to whom the said warrant or order is directed, a manifest error hath intervened, to the great damage of the said George Holmes, as in his said complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice be done to the parties aforesaid, in this behalf, you are hereby commanded, that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and proceedings in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the second Monday of January next, at the city of Washington, in the District of Columbia, being the present seat of the national government, that the record and proceedings aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at Rutland, in the said Vermont district, this thirty-first day of August, in the year of our Lord one thousand eight hundred and thirty-nine, and of the independence of the United States the sixty-fourth.

JESSE GOVE, *Clerk.*

UNITED STATES OF AMERICA, *Vermont District, to wit:*

To His Excellency Silas H. Jennison, Governor of the State of Vermont, and to John Starkweather, Esq., Sheriff of the county of Washington, in said State of Vermont, and to their successors in office, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington, in the District of Columbia, being the present seat of the

national government, on the second Monday of January next, in pursuance of a writ of error filed in the clerk's office of the supreme court of the State of Vermont, in the county of Washington, in said State, wherein George Holmes is plaintiff in error, and you are defendants, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done the parties in that behalf.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at Rutland, in said Vermont district, this thirty-first day of August, in the year of our Lord one thousand eight hundred and thirty-nine, and of the independence of the United States the sixty-fourth.

CH. K. WILLIAMS,
Chief Justice Sup. Court of the State of Vermont.

I, Joshua Y. Vail, clerk of the Supreme Court of the State of Vermont, for the county of Washington, do testify and say, that a true and attested copy of the within writ of error was delivered to John Starkweather, sheriff and keeper-in-chief of the jail in the county of Washington, on the 4th day of September, A. D. 1839; and that a like true and attested copy thereof was by me delivered to Silas H. Jennison, Governor of the State of Vermont, on the 15th day of October, 1839.

JOSHUA Y. VAIL, *Clerk.*

At Montpelier, Nov. 23, 1839.

Then Joshua Y. Vail, above named, personally appeared, and made oath to the above certificate, by him signed, in my presence.

GEORGE B. MANSER,
Justice of the Peace.

STATE OF VERMONT, WASHINGTON COUNTY, *ss:*

Washington County Supreme Court, Clerk's Office.

At Montpelier, Sept. 2, A. D. 1839.

The within writ of error received and filed in my office.
Attest: JOSHUA Y. VAIL, *Clerk.*

STATE OF VERMONT.

To all whom these presents shall come and concern, Greeting:

Know ye, that we, having inspected the files and records now remaining in our clerk's office of our Supreme Court of the State of Vermont, within and for our said county of Washington, do find

there certain copies of original files, proceedings, and records in our said court, in words and figures following, to wit:

PETITION.

"To the Honorable Supreme Court of the State of Vermont, now in session at Montpelier, within and for the county of Washington.

"Comes George Holmes, now of Montpelier, in said county of Washington, and shows to your honors that he is now imprisoned in the common jail in Montpelier, in said county; that he hath duly demanded of John Starkweather, sheriff of said county, and keeper-in-chief of said jail, true copies of all warrants and processes whereby he detains your petitioner in his custody, and [the said John hath delivered to your petitioner the paper hereto annexed, bearing date the 16th day of April, 1839, signed by Silas H. Jennison, Governor of Vermont, and declared to your petitioner that he holds him in custody by virtue of said warrant, and by none other whatever. And your petitioner avers that said warrant is illegal, unduly issued, and not warranted by the laws of the land, and that he is unlawfully imprisoned, and restrained of his personal liberty; wherefore he prays your honors to award to him a writ of *habeas corpus*, directed to the sheriff of Washington county, commanding him immediately to bring the body of your petitioner before the supreme court now in session at Montpelier; and that your petitioner may be heard in the premises, and discharged from said imprisonment.

GEO. HOLMES, by
J. MAECK, *his Att'y.*

Montpelier, July 19th, 1839.

Copy of Order.

"STATE OF VERMONT.

"To John Starkweather, Esquire, Sheriff of the county of Washington, Greeting:

"Whereas, George Holmes, late of Sorel, in the Province of Lower Canada, is now detained in the common jail in said Washington county, and under your custody, by reason of a certain charge of felony, sustained by indictment found by the grand jurors of the district of Quebec, in said province, to wit: That the said George Holmes, on the 31st day of January, 1839, at the parish of St. Louis of Kamouraska, in said district, did feloniously *kill* and *murder* one Louis Paschall Achille Tache; and whereas, the said George Holmes, not being a citizen of the State of Vermont, or of any of the United States, but a citizen of the said province of Lower Canada, and has

come into this State from the said province of Canada; and the offence, whereof he is charged as aforesaid, having been committed within the jurisdiction of said province, it is fit and expedient that he, the said George, be made amenable to the laws of said province, for the offence aforesaid.

"You are therefore required that, as soon as may be after the 27th day of (instant) April, the body of the said George Holmes, now in your custody, you convey and deliver to William Brown, the agent of Canada, or to such person or persons as, by the laws of the said province, may be authorized to receive the same, at some convenient place on the confines of this State and the said province of Canada; to the end, that he, the said George Holmes, may be therein conveyed to the said district of Quebec, and be there dealt with as to law and justice appertains.

"Hereof fail not, but of your doings in the premises make due return.

"Given under my hand, at Shoreham, this 16th day of April, 1839.

"S. H. JENNISON,
"*Governor of Vermont.*"

Whereupon a writ of *habeas corpus* was granted, and which issued as follows, to wit:

"STATE OF VERMONT, *Washington County, ss:*

"To the Sheriff of Washington County, Greeting:

"By the authority of the State of Vermont you are hereby commanded that the body of George Holmes, in the prison, as it is said, together with the day and cause of his commitment and detaining, by whatsoever name the said George shall be called or charged, you have before the supreme court, now sitting at the court-house in said Montpelier, to do and receive what the said court shall then and there consider concerning him in this behalf.

"Given under my hand, at Montpelier, in the county of Washington, this 19th day of July, A. D. 1839.

"Witness, the Hon. Charles K. Williams, Chief Judge of the Supreme Court of the State of Vermont, at Montpelier, this 19th day of July, A. D. 1839.

JOSHUA Y. VAIL, *Clerk.*"

STATE OF VERMONT, *Washington County, ss:*

Pleas of the honorable Supreme Court of Judicature and Court of Chancery, begun and holden at Montpelier, within and for the co[illegible]

of Washington, on the third Tuesday of July, anno Domini one thousand eight hundred and thirty-nine, being the sixteenth day of said month.

Present The Hon. STEPHEN ROYCE, JACOB COLLAMER, ISAAC F. REDFIELD, MILO L. BENNETT. } *Assistant Judges.*

JOSHUA Y. VAIL, *Clerk.*

No. 45.

GEORGE HOLMES *vs.* JOHN STARKWEATHER.

Be it remembered, that at the present term of this court, George Holmes, of Sorel, in the province of Lower Canada, now a prisoner in the county jail at Montpelier, within and for the county of Washington, having presented his petition stating that he is now detained and imprisoned in said Washington county jail, by virtue of an order from Silas H. Jennison, Governor of the State of Vermont, and is now held in custody by John Starkweather, sheriff of said county and keeper-in-chief of said jail, which imprisonment and detention of him, the said George Holmes, he alleges is without law or rightful authority, and praying that a writ of habeas corpus may be granted him, and he brought before said court by said Starkweather, sheriff, as aforesaid, with the reason and causes of his imprisonment and detention, as aforesaid; and a writ having issued in due form of law, the said John Starkweather brought into court the said George Holmes, and said writ, with the following return thereon, as follows, to wit:

"STATE OF VERMONT, *Washington County, ss:*

"MONTPELIER, July 20, 1839.

"In obedience to this precept, to me directed, I have the body of the within named George Holmes, herein, with a copy of the order upon which he is in my custody, to which I ask leave to refer, as a part of my return.

"JOHN STARKWEATHER, *Sheriff.*

"STATE OF VERMONT.

"To John Starkweather, Esquire, Sheriff of the County of Washington, greeting:

"Whereas, George Holmes, late of Sorel, in the province of Lower Canada, is now detained in the common jail in said Washington county, and under your custody, by reason of a certain charge of felony, sustained by indictment found by the grand jurors of the district

of Quebec, in said province, to wit: That the said George Holmes, on the 31st day of January, 1838, at the parish of St. Louis of Kamouraska, in said district, did feloniously kill and murder one Louis Paschal Achille Tache; and whereas, the said George Holmes, not being a citizen of the State of Vermont, or of any of the United States, but a citizen of the said province of Lower Canada, and has come into this State from the said province of Canada, and the offence, whereof he stands charged as aforesaid, having been committed within the jurisdiction of said province, it is fit and expedient that he, the said George, be made amenable to the laws of said province, for the offence aforesaid.

"You are therefore hereby required, that as soon as may be after the 17th day of (instant) April, the body of the said George Holmes, now in your custody, you convey and deliver to William Brown, the agent of Canada, or to such person or persons as, by the laws of said province, may be authorized to receive the same, at some convenient place on the confines of this State and the said province of Lower Canada; to the end that he, the said George Holmes, may be thence conveyed to the said district of Quebec, and be there dealt with as to law and justice appertains.

"Hereof fail not, but of your doings in the premises make due return.

"Given under my hand, at Shoreham, this 16th day of April, 1839.

"S. H. JENNISON,
"*Governor of Vermont.*"

"The foregoing is a true copy of the process, and the only process, on which the said Holmes is detained in my custody.

"JOHN STARKWEATHER, *Sheriff.*"

And now appears the petitioner, by his counsellors and attorneys, C. P. Van Ness and Jacob Maeck, and the said Starkweather, by Charles Adams, counsellor and attorney; and the counsel for said petitioner thereupon moved that the person of said George Holmes should be discharged from further detention and imprisonment by said John Starkweather, by virtue of the order of said S. H. Jennison, as aforesaid; and introduced certain documents as evidence, of each of which the following are true copies, to wit:

(A.)

"Mr. Bingham, of Concord, writes that he saw Doctor George Holmes at Montpelier, first of the month; that he wanted his parents should send an affidavit, stating their legal union, when and where, with the date of his birth, and where. We, therefore, John and Sarah Holmes, state to any legal authority it may concern, that we were legally married at our father David D. Town's house, in Wil-

liamstown, Massachusetts, in May, A. D. 1806, in presence of the family and a respectable No. of neighbors, by Parson Smith, then settled in Williamstown; that we repaired immediately to our residence in Hanover, State of New Hampshire. That our son George was born on the 26th of November, 1811; that he was our third child. That we removed to Colebrook, Coos county, in New Hampshire, in February, 1815. That George Holmes may be known by the mark left on the back of his neck and head, which was caused by a fall in the farm-cart, when between six and seven years of age. We further say that he was intrusted, for school, to the care of John Holmes, Jr., in January, 1825, until he should become of age, as a man, to act for himself. To this we set our hands and seals. June 18th, 1839.

JOHN HOLMES, [L. S.]
SARAH HOLMES. [L. S.]

"STATE OF NEW HAMPSHIRE, Coos, *ss.* JUNE 22, 1839.

"Then the above affidavit sworn to before me.

"DANIEL HARVEY,
"*Justice of the Peace.*"

(B.)

"I, M. D. L. L. Montferraud, of Berthier, in the province of Lower Canada, do depose and say, that I am sister of George Holmes, now in prison at Montpelier, Vt., under an order from M. L. Bennett, judge of the Supreme Court of Vermont; that I have known the said George from his infancy, I being older than him; that he was born in Hanover, New Hampshire, and I then resided at home; he is of the age of 28 years next October. He was about 14 years of age when he went to Canada; since that time he has lived some part of the time in the United States. His father has always, and now resides in the State of New Hampshire.

"D. L. L. MONTFERRAUD.

"Sworn to before me, June 3d, 1839.

"ISRAEL P. RICHARDSON,
"*Justice of the Peace.*"

(C.)

"VERMONT EXECUTIVE DEPARTMENT.

"*Burlington, March 16th,* 1825.

"SIR: I have the honor to forward a copy of a communication from the acting Governor of Canada, and my answer to the same; and any directions which you may please to give on the subject will

be duly attended to. The men alluded to are confined in the jail in this place, on writs issued in civil suits, in favor of the officers stated to have been robbed.

"I have the honor to be, very respectfully, your ob't serv't.

"C. P. VAN NESS.

"The Hon. HENRY CLAY."

(Copy.)

"CASTLE OF ST. LOUIS, *Quebec, March* 8, 1825.

"SIR: It has been represented to me that two men, named William Darville and James Ambridge, two soldiers of the 70th regiment, who committed a robbery on Captain Fredeumels and Lieut. Creighton, of the same corps, are now confined in jail at Burlington; and in the hope that your Excellency will be disposed to order the delivery of the offenders, that they may be brought to justice in this province, I confidently make this application for their being given up to such person as may be hereafter authorized to receive them.

"I have the honor to be, sir, your Excellency's most obedient humble servant,

"FRANCIS BURTON.

"His Excellency the Governor of the State of Vermont."

(Copy.)

"VERMONT EXECUTIVE DEPARTMENT.

Burlington, March 16, 1825.

SIR: Your Excellency's communication of the 8th instant, requesting the surrender of William Darville and James Ambridge, has been received. In answer thereto, I have to observe, that I am not, by the constitution and laws of the United States, vested with authority to cause any person to be delivered over to a foreign power, to be conveyed out of the United States, for any purpose whatever. A copy of your Excellency's communication, however, together with this answer, will be immediately forwarded to the Department of State of the United States, and as soon as I shall be informed of the decision there made, I will communicate it to your Excellency.

"I have the honor to be, with very great respect, your Excellency's obedient servant,

"C. P. VAN NESS.

"His Excellency Sir FRANCIS BURTON."

"DEPARTMENT OF STATE, *Washington, 25th March*, 1825.

"His Excellency CORNELIUS P. VAN NESS, Governor of Vermont, *Burlington*.

"SIR—I have submitted to the President of the United States the letter which your Excellency addressed to me on the 16th instant, with the correspondence which it enclosed, between the acting Governor of Canada and yourself, in relation to William Darville and James Ambridge, who are stated to have committed a robbery in the province of Canada, and to have taken refuge in Vermont; and requesting, on the part of that officer, that the supposed offenders might be delivered up to such person as should be authorized to receive them, for the purpose of being brought to justice in Canada.

"I am instructed by the President to express his regret to your Excellency that the request of the acting Governor of Canada cannot be complied with under any authority now vested in the Executive Government of the United States—the stipulation between this and the British Government, for the mutual delivery over of fugitives from justice, being no longer in force; and the renewal of it by treaty, being, at this time, a subject of negotiation between the two Governments. I have the honor to be, &c. &c.

"H. CLAY."

"UNITED STATES OF AMERICA, *Department of State*.

"To all whom these presents shall come, greeting:

"I certify that the annexed papers are true copies of a letter from C. P. Van Ness to Henry Clay, dated March 16th, 1825, of the copies of the letters mentioned in Mr. Van Ness's letter, and of the record of Mr. Clay's answer to Mr. Van Ness; all of which are on file or record in this department.

"In testimony whereof, I, A. Vail, acting Secretary of State of the United States, have hereunto subscribed my name, and [SEAL.] caused the seal of the Department of State to be affixed. Done at the city of Washington, this third day of July, A. D. 1839, and of the Independence of the United States of America the sixty-third.

"A. VAIL."

Wherefore, after a full hearing of the parties, and all and singular the premises aforesaid being seen and fully examined, it is adjudged by the court here, that the aforesaid cause of detention and imprisonment of the said George Holmes is good and sufficient in law, and that he be remanded and be held accordingly under the process set forth in the return to this writ of habeas corpus.

And after judgment, and before execution of said process of his Excellency S. H. Jennison, and while said George Holmes was in the custody of said John Starkweather, under said habeas corpus, a writ of error was received and filed in my office, and a copy thereof served on said John Starkweather, while said George Holmes was still remaining in his custody, under said habeas corpus—to wit, on the 4th day of September, 1839; and a like copy was served on said S. H. Jennison, on the 15th day of October, 1839.

Attest: JOSHUA Y. VAIL, *Clerk.*

All which we have caused to be exemplified by these presents, and the seal of our said court to be hereunto affixed.

Witness, the Honorable Charles K. Williams, Chief Justice of our said Supreme Court, at Montpelier, aforesaid, this 16th day of October, anno Domini one thousand eight hundred and thirty-nine.

JOSHUA Y. VAIL, *Clerk.*

SUPREME COURT OF THE UNITED STATES, *January Term*, 1840.

GEORGE HOLMES
vs.
SILAS H. JENNISON and
JOHN STARKWEATHER.

And now, at this same term, before the Justices of the Supreme Court of the United States, comes the said George Holmes, by C. P. Van Ness, his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the judgment aforesaid, in form aforesaid given, was given that the said cause of the detention and imprisonment of the said George, as set forth in the return to the said writ of habeas corpus, was good and sufficient in law, and that the said George be remanded and held accordingly, under the process set forth in the return to the said habeas corpus; whereas, by the law of the land, the said judgment ought to have been given that the said cause of the detention and imprisonment of the said George was not good and sufficient in law, and that he be released and discharged from such detention and imprisonment.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given against the said George; whereas, by the law of the land, the said judgment ought to have been given in favor of the said George.

And the said George prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and held for nothing; and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

C. P. VAN NESS, *Attorney.*

"DEPARTMENT OF STATE, *Washington*, 25*th March*, 1825.

"His Excellency CORNELIUS P. VAN NESS, Governor of Vermont, *Burlington*.

"SIR—I have submitted to the President of the United States the letter which your Excellency addressed to me on the 16th instant, with the correspondence which it enclosed, between the acting Governor of Canada and yourself, in relation to William Darville and James Ambridge, who are stated to have committed a robbery in the province of Canada, and to have taken refuge in Vermont; and requesting, on the part of that officer, that the supposed offenders might be delivered up to such person as should be authorized to receive them, for the purpose of being brought to justice in Canada.

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"H. CLAY."

"UNITED STATES OF AMERICA, *Department of State*.

"To all whom these presents shall come, greeting:

"I certify that the annexed papers are true copies of a letter from C. P. Van Ness to Henry Clay, dated March 16th, 1825, of the copies of the letters mentioned in Mr. Van Ness's letter, and of the record of Mr. Clay's answer to Mr. Van Ness; all of which are on file or record in this department.

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Wherefore, after a full hearing of the parties, and all and singular the premises aforesaid being seen and fully examined, it is adjudged by the court here, that the aforesaid cause of detention and imprisonment of the said George Holmes is good and sufficient in law, and that he be remanded and be held accordingly under the process set forth in the return to this writ of habeas corpus.

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There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given against the said George; whereas, by the law of the land, the said judgment ought to have been given in favor of the said George.

And the said George prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and held for nothing; and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

C. P. VAN NESS, *Attorney.*

485.

SUPREME COURT OF THE UNITED STATES.

No. 46.

ISAAC T. PRESTON, EXECUTOR OF JAMES BROWN, DECEASED, PLAINTIFF IN ERROR,

vs.

RICHARD R. KEENE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR EAST LOUISIANA.

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CIRCUIT COURT OF THE UNITED STATES,

Ninth Judicial Circuit, and Eastern District of Louisiana.

Be it remembered, that on the fifteenth day of May, in the year of our Lord, one thousand eight hundred and thirty-eight, Richard Raynal Keene, Esq., came into Court, and filed the following petition, to wit:

To the honorable the Judges of the Circuit Court of the United States for the ninth Circuit, and Eastern District of Louisiana.

The petition of Richard Raynal Keene, Counsellor at law, a citizen of the State of Mississippi, respectfully sets forth:

That by and in virtue of a notarial contract, (an exemplification of which is hereto annexed) made in the city of New Orleans, in said district, under date of August 21, 1807, by your petitioner, with the late James Brown and his brother Samuel Brown, both deceased, they became bound for a valuable and sufficient consideration, by them actually received and enjoyed, to convey and deliver to your petitioner a lot of ground of specific dimensions, containing 7200 square feet, situated in or upon the New Orleans or Gravier batture, in the district aforesaid. That the said James Brown and Samuel Brown were bound jointly and severally to carry said contract into effect. That for a series of years of greater or less duration, after the date of said contract, there was no partition or division made of said batture into saleable lots, although an expectation was always kept up of an approaching realization of such division or partition. That before said partition, your petitioner went to Europe and did not return to New Orleans until 1830. That according to the laws of Louisiana, the said Browns, or either of them, for the fulfilment of their joint and several contract aforesaid, required not the personal presence of your petitioner in New Orleans, as upon their suggestion, or the suggestion of either of them, a *curator ad hoc* would have been appointed to represent him, and to receive, for and in behalf of your petitioner, the conveyance and delivery of said lot. That in Europe, to wit, in Paris, in 1824, your petitioner met with said James Brown, and required of him an order for taking possession of said lot, or an acknowledgment that would be equivalent thereto, with a view to your petitioner's making sale of the same in Paris, to some one of the many Louisianians who were then in that city. That said James Brown then and there gave positive assurance to your petitioner that, according to the contract aforesaid, not himself, the said James Brown, but Edward Livingston, an eminent lawyer, and wholesale batture-dealer, in New Orleans, was the person who was bound to make to your petitioner the conveyance and seizin of the lot in question. That your petitioner, although astounded by this annunciation, yet knowing, on account of his long

absence from Louisiana, and his utter destitution of copy or note of said contract, that, in respect of the precise stipulations thereof, his own memory was *rusty*, whilst the memory of said James Brown, in relation to that affair, by reason of his recent transit from New Orleans to Paris, ought to be presumed to be *bright;* your petitionor, it is repeated, for these considerations, gave into and acquiesced in that *Brownonian version* of said contract; and upon the *hypothesis* that said version was *correct*, he, your petitioner, consented to look to said Livingston for the conveyance and seizin of the lot aforesaid. That your petitioner, as soon thereafter as was in his power, to wit, in 1830, arrived in New Orleans, and thereupon, on the inspection of the record of said contract, discovered the immense difference between *Brownonian pharmacy, that iuvigorates a patient's body, by stimulus*, and *Brownonian contract-construction*, which renders the *purse* of a vendee *lank by depletion;* for the very name of Livingston is unknown to that record, whilst by the same record, the responsibility of said James Brown, for the conveyance and delivery of said lot to your petitioner, is made manifest. Your petitioner further represents, that at divers times, after the discovery just mentioned of the frailty of the said James Brown's Parisian recollections of his liability to your petitioner for the lot aforesaid, your petitioner demanded of him, but in vain, his fulfilment of that responsibility. That the said James Brown, under date of July 11, 1832, made his "*Olographic* will," in reference to the laws of Louisiana, and in it styled himself "of Louisiana," as in truth he was then, and continued to be until his death, a citizen of Louisiana. That in said will, he named and constituted Isaac T. Preston, of New Orleans, and a citizen of Louisiana, his executor; that in virtue of said will, the said Isaac T. Preston, July 11, 1835, in accordance with his prayer to that effect, obtained in New Orleans due judicial authorization for executing the same, and that without having settled up his accounts as executor aforesaid, and without having got a discharge from his said executional trust, the said Isaac T. Preston is now engaged in fulfilling his executional duties in respect of said will.

Therefore your petitioner prays, the premises considered, that said Isaac T. Preston, constituted executor as aforesaid, and still acting in that capacity, be cited to appear and answer this petition, and, after due proceedings, that he be condemned and adjudged to convey and deliver to your petitioner, with good and valid title, a lot of ground of sixty feet front, with or by one hundred and twenty feet in depth, in or upon the batture aforesaid, or to pay to your petitioner the value of said lot, which present value is the sum of thirty-seven thousand five hundred dollars, in fulfilment of the notarial obligation of said James Brown, contracted in manner aforesaid, in favor of your petitioner; and that all other and further relief be afforded to your petitioner that may be right and just, and your petitioner, &c.

(Signed) RICHARD RAYNAL KEENE.

And on the same day the following citation issued from the clerk's office, to wit:

UNITED STATES OF AMERICA, ss.

CIRCUIT COURT OF THE UNITED STATES,
For the Ninth Circuit and Eastern District of Louisiana.

R. R. KEENE
vs.
PRESTON, Exr. of J. BROWN.

Mr. Isaac T. Preston, executor of J. Brown, you are hereby summoned, to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the circuit court of the United States for the ninth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof.

Witness the Honorable Roger B. Taney, Chief Justice of the [SEAL.] Supreme Court of the United States, this fifteenth day of May, A. D. eighteen hundred and thirty-eight.

(Signed) T. W. COLLENS, *Dy. Clerk.*

Marshal's Return.

Received, Tuesday, May 15, 1838, and on the 16th of same month served a copy of this citation, together with a duly certified copy of the plaintiff's petition on the within named Isaac T. Preston, in person, at New Orleans.

(Signed) J. H. HOLLAND, *Marshal.*

And afterwards, on the 27th day of October, 1838, the plaintiff, R. R. Keene, Esq. came into court and filed the following prayer for a judgment by default, to wit:

R. R. KEENE
vs.
I. T. PRESTON, Exr. of JAMES BROWN.
} United States 9th Circuit Court, for the Eastern District of the State of Louisiana.

The citation in this case having been duly served, and no answer having been filed after a lapse of seven months thereafter, judgment by default is prayed for by the plaintiff, to be entered by the clerk.

(Signed) R. R. KEENE.

And thereupon, on same day, the following entry was made of record, to wit:

In Vacation.

SATURDAY, 27th October, 1838.

R. R. KEENE,
vs.
I. T. PRESTON, executor of J. Brown. } No. 360.

On application, and by a written order of Richard Raynal Keene, Esq., the plaintiff in this case, judgment by default is hereby entered, process having been duly served and no answer filed.

And afterwards, on the 23d day of November, 1838, Isaac T. Preston came in person, in open court, and filed the following answer, to wit: which answer was also signed by R. H. Chinn, Esq., his attorney.

To the honorable the circuit court of the 9th circuit of the United States, in and for the eastern district of Louisiana, the answer of Isaac T. Preston, executor, of the will of James Brown, to the petition of Richard R. Keene, respectfully shows:

That, on the 21st of August, 1807, the plaintiff transferred to James and Samuel Brown his right to a tract of land, for and in consideration of a certain lot or parcel of land, consisting of sixty feet front and one hundred and twenty feet deep, situated on the batture, then lately decreed and adjudged to John Gravier, by the superior court holden in the city of New Orleans.

Your respondent alleges that John Gravier had recovered the title to and possession of the batture, in front of the suburb St. Mary, by a judgment of the superior court of the Territory of Orleans, rendered about the 23d of May, 1807, in a suit, instituted in his name, against the corporation of New Orleans. He further alleges that John Gravier had sold two-thirds of said batture to Peter Delabigarre, by a private act, dated the 26th day of March, 1804, and enregistered in the office of a notary public on the 27th of March, 1804; and that Peter Delabigarre had sold one-half of those two-thirds of the batture to Edward Livingston, by private act, ont he same day, and which was enregistered in the office of a notary public on the 5th day of February, 1807.

Your respondent further alleges that Peter Delabigarre, about that time, departed this life, and, by his will duly proved, had appointed Blaise Cenas, Barthelemy Lafon and Lacarriere Latour trustees under his will, and directed them to make partitions of said batture, and to sell so much thereof as might be necessary to pay the incumbrances and necessary expenses, and to secure the title thereof. He alleges that said trustees and Edward Livingston made an act of partition of their two-thirds of the batture on the 14th day of August, 1807, in which it was acknowledged that a lot of land of sixty feet front and one hundred and twenty feet in depth, fronting on the present road, meaning Tchapitoulas street, was to be conveyed to James Brown, a counsellor at law, who had been employed in prosecuting the claim of the said John Gravier to the said property, and the said trustees agreed, in pursuance of the powers vested in them by Peter Delabigarre's will, to convey to James Brown the said lot of ground out of their proportion of the batture.

Your respondent alleges that it was in consideration of the right of James Brown, as above specified, to a lot of land on the batture, that plaintiff made the conveyance, a copy of which is annexed to his petition, on the 21st day of August, 1807. He denies that James Brown ever conveyed or agreed to convey title for the said lot to the plaintiff, himself, but only agreed to substitute the plaintiff to himself to receive such title as the representatives of Peter Delabigarre and Edward Livingston could give. He alleges that on the next day, the 22d of August, 1807, the said James Brown addressed a letter to Messrs. Lafon & Cenas, executors of the will of Peter Delabigarre, acknowledging that plaintiff had become the owner of the lot due to him by Edward Livingston, and requesting them, in pursuance of the agreement between him and plaintiff, to execute to plaintiff the deeds necessary to convey the property.

Your respondent believes and avers that it was Edward Livingston who employed James Brown as counsel in the above-mentioned suit of John Gravier against the corporation of New Orleans, and promised him a lot on the batture in consideration of his professional services, and provided for the fulfilment of his promise after the termination of the suit in the manner above stated.

Your respondent alleges that, in different letters addressed by the plaintiff to James Brown, in the month of May, 1824, he admitted and acknowledged that he merely acquired a right from said Brown to be his substitute for receiving the conveyance from *or through* Mr. Livingston, of New Orleans, of the lot on the batture of that city, which said Livingston promised to James Brown for an equivalent for his services in the said batture cause. And in a letter addressed to said Brown, dated at Paris, on the 17th day of May, 1824, the plaintiff admitted that a note addressed to him by James Brown in relation to the transaction, which is the subject-matter of this suit, was satisfactory, which note, your respondent believes and avers, referred to the lot above mentioned; and requested Edward Livingston, or his representative, to transfer or cause to be transferred to the plaintiff the said lot; and in the said letter of the 17th day of May, 1824, the plaintiff again acknowledged that the responsibility of said Brown, about the batture lot, did not extend beyond the substitution of plaintiff for himself in respect to the conveyance to be made by Mr. Livingston.

Your respondent believes and avers that the plaintiff was one of the counsel of the corporation of New Orleans in the above-mentioned suit, and was perfectly acquainted with the right of James Brown to the said lot, and that it was the right of James Brown thus known to him, and not a title from and warranted by said Brown, which was the consideration of the deed annexed to plaintiff's petition.

Your respondent alleges that, at the date of the act annexed to plaintiff's petition, and long subsequent thereto, both Edward Livingston and the representatives of Peter Delabigarre had large portions of the batture in their possession, but that James Brown could not demand, sue for, or recover the above-mentioned lot, because, to their knowledge, he had transferred his right to the plaintiff. He alleges, however, that they would and could have been compelled to convey a formal title to the lot aforesaid to the plaintiff, if he had demanded or sued for the conveyance.

Your respondent has been informed, believes, and avers that, shortly after the date of the act annexed to plaintiff's petition, a lot was designated for the plaintiff, by those who *owed* it, to the said James Brown, and that he exercised ownership over it, and endeavored to sell it. In consequence of all which facts your respondent alleges that if the right of James Brown to said lot has been lost, it has been lost by the fault and negligence of the plaintiff, and not by the fault or negligence of James Brown; and even if the latter had been bound in warranty to the plaintiff, the warranty is discharged by law upon these facts.

Your respondent denies all the allegations in plaintiff's petition contained, material to charge him with the plaintiff's demand, except as herein before admitted.

He further pleads the prescriptions of one, five, ten, twenty, and thirty years against the plaintiff's demand, and, for all the reasons above pleaded, prays judgment in his favor against said demand, and for costs of suits.

He further alleges that he has no other funds or property of James Brown's estate in his possession or under his control than what is exhibited in his account as executor, rendered to the court of probate of the parish of Orleans, on the , a copy of which he will forthwith file in this honorable court; and he prays that if the plaintiff have any claim, which he denies, that the same may be paid by decree of this honorable court, concurrently with all the other creditors of the estate, according to the laws of Louisiana.

And he prays this honorable court to do, order, and adjudge whatever else may be just and equitable, and may be required by the nature of the case. As in duty bound, &c.

(Signed) ISAAC T. PRESTON,
(Signed) R. H. CHINN,
Att'y for def't.

And afterwards on the 26th day of November, 1838, the defendant, Isaac T. Preston, came into court and filed the following affidavit, to wit:

CIRCUIT COURT OF THE UNITED STATES,
9th Circuit, in and for the Eastern District of Louisiana.

RICHARD R. KEENE
vs.
ISAAC T. PRESTON, EXR. &c.

Isaac T. Preston, executor of James Brown, the defendant, being duly sworn, doth depose and say, that the testimony of Col. Samuel B. Davis, residing in the city of Philadelphia or its vicinity, is material to the defendant in the above cause, in as much as he expects to prove by said Davis the facts stated in his affidavit, a copy of which is annexed.

(Signed) ISAAC T. PRESTON.

Sworn to and subscribed at New Orleans, this 24th day of November, 1834, before me.

(Signed) GALIEN PREVAL, *Judge.*

And thereupon, the following entry was made of record, to wit:

MONDAY, November 26th, 1838.

R. R. KEENE
vs.
ISAAC T. PRESTON.

On motion of R. H. Chinn, of counsel for defendant, and on filing an affidavit, ordered that a commission issue, directed to the mayor of the city of Philadelphia, returnable on the 25th day of January, 1839.

And afterwards, on the 7th day of June, the following entries were made of record, to wit:

FRIDAY, June 7th, 1839.

Present, Honorable P. K. Lawrence, district judge; Honorable John McKinley, presiding judge, absent.

R. R. KEENE
vs.
I. T. PRESTON, Exr. of James Brown. } No. 360.

This case came on to-day for trial before the court, plaintiff appearing in person, and defendant appearing also in person, and by his attorney, R. H. Chinn, Esq., when after considerable progress in the cause, this case was continued for further hearing until to-morrow.

R. R. KEENE
vs.
I. T. PRESTON, Exr. of Brown. } No. 360.

On motion of the plaintiff, the testimony of I. C. Harrison, taken in this case by O. P. Jackson, judge, was opened and filed in open court.

And afterwards, on the 8th day of June, 1839, the following entry was made of record, to wit:

R. R. KEENE
vs.
I. T. PRESTON, Exr. of James Brown.

This cause was this day resumed, when, after hearing arguments of counsel, the court took time to consider.

And afterwards, on the 24th day of June, 1839, the following judgment was entered of record, to wit:

R. R. KEENE
vs.
I. T. PRESTON, Exr. of Brown's Estate. } No. 360.

In this case it is considered by the court that the plaintiff do recover from the defendant, as testamentary executor of James Brown, deceased,

the sum of thirty-one thousand five hundred dollars, with costs of suit, to be paid out of the succession of said Brown to the plaintiff, concurrently with the other debts of the succession not privileged according to the laws of Louisiana; and it is further considered by the court, that in case the said defendant shall, on or before the 10th day of July now next ensuing, convey to said plaintiff, with good and legal title, a lot of ground of the value of $31,500, containing 60 feet in front by 120 feet in depth, situated on the batture in front of the suburb St. Mary, in New Orleans, the same that was adjudged to John Gravier by the superior court of the late Territory of Orleans, in the month of May, 1807, then said judgment, exclusive of costs, shall be deemed satisfied.

And afterwards, on the 29th day of June, 1839, the following bill of exception was filed in the clerk's office, to wit:

R. R. KEENE
vs.
T. PRESTON, Exr. of James Brown. } No.

Be it remembered that, on the trial of this cause, the defendant offered in evidence the deposition (see page 11th of this transcript) of S. B. Davis, to which the plaintiff objected on the ground that, as *parol evidence, it was inadmissible to explain or to serve in the interpretation of a notarial contract*, the court sustained plaintiff's objection and rejected the deposition; and to that decision of the court, the defendant excepted, tenders this bill of exception, which he prays may be signed sealed and enrolled.

(Signed) P. K. LAWRENCE, *U. S. Judge.*

Depositions of S. B. Davis, referred to above.

CIRCUIT COURT OF THE UNITED STATES,
Ninth Circuit in and for the Eastern District of Louisiana.

RICHARD R. KEENE
vs.
JAMES BROWN'S Executor.

Interrogatories to Col. Samuel B. Davis, residing in or near Philadelphia, to be qualified and examined under the annexed commission:—

1. Are you acquainted with the plaintiff, and were you acquainted with the late James Brown?

2. Were you ever a resident of Louisiana, and from and until what periods?

3. Have you any knowledge whether or not the plaintiff obtained from James Brown a lot of ground on the batture of the suburb St. Mary? Did plaintiff or not offer to dispose of it?

4. Do you know in what manner and for what considerations, James Brown obtained that lot, and what was his title to the same? if so, state fully.

5. Had the plaintiff any conversations with you, in relation to the possession of said lot, or the character of his title to the same? Please to state fully when these conversations took place, and what they were. Had you any conversations on the subject in presence of both Mr. Keene and Mr. Brown? State particularly what the conversations in their presence were.

6. Was there or not, at that period, doubts and difficulties as to the title to the lots on the batture, and what were those difficulties?

7. What was the value of a lot on the batture, of sixty by one hundred and twenty feet, at that period and in that state of the title?

8. Do you know any other matter or thing that would be useful to the defendant in the above cause?—if so, please to state the same as fully as if particularly interrogated thereto.

(Signed) ISAAC T. PRESTON, *Executor.*

The plaintiff in this case, reserving in the fullest extent the right of exception, in all legal respects, to the commission therein taken and to the preceding interrogatories in chief propounded under it, subjoins the following cross interrogatories, to be acted upon in his behalf, through the intervention of William Rawle, Esq., of Philadelphia.

1. Were you not in the armed service, privateer, or national, or both, of France, in the epoch of her depredations upon the commerce of the United States?

2. At what time and in what terms did you write to Colonel T. D. D. Bellechasse, of Cuba, about Myra Clark, the daughter of Daniel Clark, and her property, whilst that property was under the control of Bellechasse?

3. In the Gazette called the "Pennsylvanian," published in Philadelphia under date of January fourth, 1836, a communication is inserted, bearing date December 19, 1835, with your signature attached to it, and purporting to have been addressed by you, in the first instance, to the editor of the *New York Evening Star;* and in that publication, inter alia, are the following expressions: "It is said in the statement in your newspaper, that soon after her birth, Myra, now Mrs. Whitney, was confided to the care of Mrs. Davis, wife of Col. Davis, of Philadelphia, who lived in or near New Orleans," and subsequently that "from the time of her birth, or from a few days after that event, she was placed in charge of Mrs. Davis;" at no time and in no manner was she placed "in our charge;" at no time and in no manner while she remained with us, did any human being but ourselves contribute to her maintenence or support, either during the lifetime of her parent or since his death. "I refused to part with her except on the condition of such an acknowledgment. To this he would not assent, and his child accompanied me. This refusal of mine was the cause of a coldness between Mr. Clark and myself, which, I regret to say, continued during the short period that elapsed until his death. I never did make any application for alimony, nor did any person in my behalf ever make such application, and for the truth of this assertion I appeal to the proper tribunal in New Orleans."

Now do you acknowledge the communication referred to, to be yours? and do you ratify the preceding extract therefrom?

4. Have you not deposed under *oath* or *affirmation*, on different occasions, respecting the lot referred to?

5. Is it your custom to make judicial declarations under an *affirmation?* and if yea, is it from *religious scruples* against an *oath?*

6. On what evidence is your knowledge founded of the alleged facts heretofore *sworn* to, or *affirmed* by you? first, that the lot in question is a "*corner*" lot, and in the next place, that this "*corner*" lot was transferred by Livingston to Brown, as a *donation* or *present?*

7. In respect of the half lot of 30 feet front by 120 feet in depth, on the New Orleans batture, which in a negotiation between Henry McCall and yourself, you have deposed to have been "*just thrown into the bargain as* worth almost nothing;" now what is the *precise* and *specific* cause of the sudden rise of the value of that half lot to *ten thousand dollars?*

8. Was it not the custom in general, and yours in particular, in the sale of batture property, to guard against responsibility for non account of the title to the same, in some clear and determinate manner, when a guarantee of title was not contemplated?

9. When it is notorious that James Brown was a shrewd lawyer and a zealous guardian of his interests, how do you account for his silence in his batture-lot contract with plaintiff, as to the responsibility of Livingston, and his own irresponsibility in respect of the title to that lot, in behalf of the plaintiff, and his leaving that silence to be remedied, after a long lapse of time, by your *parole commentaries* upon his notarial text? Before opening his femoral artery, when his trial with plaintiff was about coming on, in relation to the before-mentioned lot, did he not, in his frequent readings to you whilst you were suffering from impaired sight, express the embarrassment and confusion that overwhelmed him, by reason of Livingston's detection and exposure, *published by the plaintiff*, of his, Brown's, *anti-record* assurance, given in Paris, in 1824, to the plaintiff, to the effect that, *by contract*, the notarial contract between them, not himself, but Livingston, was to deliver to plaintiff the lot in question? And do you not suppose that Brown, had he not committed suicide, and were now, instead of his executor, managing this, his own case, in open court, before an honorable and enlightened jury, would shrink with dismay from pressing upon them his *Paris imposture*, in defiance of his *authentic contract* and *Livingston's exposition of that imposture?*

10. As on a former occasion, you deposed that *after* a certain negotiation between you and plaintiff, about the lot in question, was *broken off*, many *minute* and *detailed* discussions were still carried on between the parties on the same subject, whereby an extraordinary retentiveness of memory was evinced by you, to be equalled only by the ingenuity of *keeping alive a broken off* negotiation. How or why did it happen that on your cross examination, after your specification of the very *minutes* and *seconds*, as it were, of that negotiation, your memory entirely failed you in respect of the *year* in which it was carried on? Is it common for

deponents on or respecting contested matters, to remember *minutes* on one side, and on the other side to forget *res majores?*

11. Having already deposed that Edward Livingston "*had taken the whole batture*," meaning the New Orleans batture, be pleased to respond to the question *how* and *when*, and by what *law*, whether *common law*, *civil law*, *statute law*, or *Lynch law*, that gentleman—well known, indeed, not to be satisfied with *trifles*—worked himself into possession of the "*whole batture?*"

(Signed) RICHARD RAYNAL KEENE.

COMMONWEALTH OF PENNSYLVANIA, *City of Philadelphia, ss.*

Deposition of Colonel Samuel B. Davis, duly taken under the annexed commission and interrogatories at my office, in the city of Philadelphia, this twenty-eighth day of March, A. D. (1839) eighteen hundred and thirty-nine, the witness being first sworn, and the examination reduced to writing by my clerk, the whole done by and before me.

(Signed) I. ROACH, [SEAL.]
Mayor of the City of Philadelphia.

To the first interrogatory the deponent answers, yes.

To the second interrogatory the deponent answers: I was a permanent resident of Louisiana from about eighteen hundred and two to the breaking out of the war of 1812. I returned thither in the winter of 1814 with General Jackson's army, and continued to reside there until about 1822.

To the third interrogatory the deponent answers: I know that the plaintiff obtained from James Brown a lot of ground on the batture of the suburbs of St. Mary, and that the plaintiff offered to dispose of it to me.

To the fourth interrogatory the deponent answers: I only know how James Brown obtained that lot, and for what consideration from himself. I know of no other title than that which Mr. Livingston could give; it was notorious that there was no other title to be had. Mr. Keene himself told me that he could give me no other.

To the fifth interrogatory the defendant answers: The plaintiff had conversations with me in relation to the possession of said lot, and the character of his title to the same. I can't tell you exactly what the conversations were, nor the time, but I can tell you the amount of them. It was about the time Mr. Livingston had his first suit, Mr. Keene proposed to sell me the lot, but he had no title to give me which I thought was sufficient, nor did he ever take possession of the lot to my knowledge. Keene told me of whom he got the lot, and what he thought it was worth, and if I remember right, about four hundred dollars, but I can't say exactly; I would not purchase the lot in consequence of not being able to get a title to it; he was to give me no other title than what he could get from Mr. Livingston; I never understood him he was to get any title from Mr. Brown at all, but it was to come from Mr. Livingston; I don't know that that was the very language he used; he offered me the lot; I

was to take the lot as it stood—there was no guarantee of title; I was to take it as he had it, at the risk of getting it or losing it; the negotiation broke off because he could not make a title, and I being unwilling to make it a speculation. I remember very well the spot where we were standing when it broke off; it was in the middle of the street, opposite the old coffee-house door. About the same time a conversation on the subject took place in my presence between Mr. Keene and Mr. Brown: they were speaking on the subject, and Brown said to Keene he would give him an order on Mr. Livingston to put him in his place as to the lot. Mr. Brown appeared to consider the matter of very little consequence any how, and took very little interest in it. I don't remember that Mr. Keene asked Mr. Brown for any other title, nor did I ever hear that he asked him for any other; they met by accident in the street; and it was a simple conversation about Mr. Keene being placed in the stead of Mr. Brown.

To the sixth interrogatory the deponent answers: There were at that period doubts and difficulties as to the title to lots on the batture; it was believed firmly by the citizens that the city never would part with the batture if they could help it.

To the seventh interrogatory the deponent answers: Nobody could pretend at that time, and in that state of the title, what was the value of a lot on the batture, or whether it was worth any thing. Some persons might give you a hundred dollars for it, while others would not accept it as a gift.

To the eighth interrogatory the deponent answers: I know nothing more than what I have said.

To the first cross interrogatory the deponent answers: I was for many years a lieutenant *de vaisseau* in the navy of France, but never in any private armed vessel under any colors. I left the French service in 1798.

To the second cross interrogatory the deponent answers: I wrote to him, to the best of my knowledge, that she was now married. I wrote to him in such terms as one friend would to another, both interested in the same individual.

To the third interrogatory the deponent answers: I acknowledge the communication referred to to be mine. I ratify all but that which relates to the alimony. I entered the suit for alimony by advice of Mr. Livingston; but either Mr. Chew or Relf met me in the street, and, in a friendly manner, asked me to withdraw it; that they would do what was right; and this I had forgotten at the time I penned the article in the Pennsylvanian.

To the fourth cross interrogatory the deponent answers: I have.

To the fifth cross interrogatory the deponent answers: It was my custom to affirm, having been brought up by a very strict quaker. It was not from religious scruples, but from habit.

To the sixth cross interrogatory the deponent answers: I have already answered in my interrogatories in chief to which I refer. I saw it marked, a corner lot, in Brown's name, on the map hanging in the coffee-house. Brown told me it was a donation from Livingston.

To the seventh cross interrogatory the deponent answers: I don't know that I should have used that strong phrase, "Just thrown into the bargain as worth almost nothing." I should have said that it would have had no weight with me in the negotiation with Mr. McCall. Either two or three days after the sale to me by McCall of the lot into the bargain for which he put the batture lot, the suit was decided, and the title was confirmed.

To the ninth cross interrogatory the deponent answers: I know nothing about it, not having sold property of the kind.

To the tenth cross interrogatory the deponent answers: I can't account for Mr. Brown's silence. Mr. Brown never read to me in his life, and never expressed to me embarrassment or confusion about this or any other matter. I am very certain that Mr. Brown would shrink from any thing dishonorable, but that he would not shrink from this attack on him.

To the eleventh cross interrogatory the deponent answers: It is a great deal easier to remember conversations than dates.

To the twelfth cross interrogatory the deponent answers: That is a thing for the court to answer. I can't answer it.

(Signed) SAMUEL B. DAVIS.

Sworn and subscribed before me, this 28th day of March, A. D. 1839.

(Signed) I. ROACH, *Mayor.*

The foregoing deposition is taken, subject to all legal exceptions.

(Signed) WM. RAWLE, *for pl'ff.*

(Endorsed.) Filed June 7th, 1839.

(Signed) D. N. HENNEN, *Clerk.*
By L. C. HORNSBY, *D'y Clerk.*

Commission.

CIRCUIT COURT OF THE UNITED STATES,
For the Eastern District of Louisiana.

To the Mayor of the city of Philadelphia:

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call and cause to come before you Samuel B. Davis, and him duly examine on oath, touching and concerning certain matters and things in a cause now depending in the said court, wherein R. R. Keene is plaintiff and Isaac T. Preston is defendant; and the same examinations so taken and reduced to writing, you certify, under your hand and seal, and send enclosed to this court, without delay, to be read in evidence on the trial of said cause, and send also this writ.

Witness the Honorable P. K. Lawrence, judge of said court, at the city of New Orleans, this 29th day of November, anno [SEAL.] Domini, 1838, and the 63d year of the independence of the United States of America.

(Signed) JNO. WINTHROP, *Clerk.*

Address.

KEENE
vs.
BROWN'S Executor.

To the clerk of the circuit court of the United States for the eastern district of Louisiana.

Deposition of Samuel B. Davis, New Orleans.

Endorsed.

Seals broken and filed in open court at the request of I. T. Preston, Esq. April 9, 1839.

(Signed) JNO. WINTHROP, *Clerk.*

And on same day (29th June, 1839,) the defendant came into court by his attorney, R. H. Chinn, Esq., and filed the following petition in error, to wit:

IN CIRCUIT COURT OF THE UNITED STATES,
Ninth Circuit and Eastern District of Louisiana.

R. R. Keene *vs.* I. T. Preston, Executor of last will of James Brown, deceased.

The defendant respectfully suggests to the court that error has intervened herein to the prejudice in the judgment pronounced at the present term of the court, which he desires to have corrected by the Supreme Court of the United States, upon his executing bond with security conditioned according to law. He prays for general relief in the premises.

(Signed) CHINN, *for Deft.*

Order.

Let an appeal be granted in the foregoing case on the defendant, executing bond with James Erwin, security in the penalty of sixty thousand dollars, conditioned according to law.

(Signed) P. K. LAWRENCE, *U. S. Judge.*

And afterwards, on the third day of July, one thousand eight hundred and thirty-nine, the following appeal bond was filed in the clerk's office, to wit:

Know all men by these presents, that we, Isaac T. Preston, executor of the last will and testament of James Brown, deceased, and James Erwin, are held and firmly bound unto Richard R. Keene in the just and full sum of sixty thousand dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, &c. jointly and severally, firmly by these presents; sealed and dated this third day of July, 1839.

The condition of the above obligation is such, that whereas, at the May term of the court of the United States for the ninth circuit and eastern district of the State of Louisiana, a judgment was rendered in favor of said Keene, and against the said Preston, as executor of James Brown, deceased, for the sum of thirty-one thousand five hundred dollars, besides costs of suit, to be paid out of the succession of said Brown to

the said Keene, concurrently with the other debts of the succession not privileged according to the laws of Louisiana, with a privilege to the said Preston to satisfy the judgment by conveying a lot, as in said judgment described, together with the costs of suit; from which judgment the said Preston has prayed for and obtained an appeal to the next term of the Supreme Court of the United States, upon his executing this bond with James Erwin as security. Now, if the said Preston shall prosecute the said appeal with effect, or, upon his failure to do so, shall well and truly pay and satisfy said judgment as far as the assets in his hands as executor shall extend, then this obligation to be void, otherwise to remain in full force and virtue.

(Signed) ISAAC T. PRESTON, [SEAL.]
(Signed) J. ERWIN. [SEAL.]

Witness present:

(Signed) DUNCAN N. HENNEN.

And on the 27th day of June, 1839, the following agreement was filed in the clerk's office, to wit:

U. STATES COURT,
9th Circuit and Eastern District of Louisiana.

RICHARD RAYNAL KEENE
vs.
ISAAC T. PRESTON, ex'or of JAMES BROWN, dec'd.

Be it remembered, on the trial of this cause, the plaintiff read in evidence the following documents, to wit:

Act of Sale.

Know all men by these presents, that I, Richard Raynal Keene, of the city of New Orleans, for and in consideration of a certain lot or parcel of land, consisting of sixty feet front and one hundred and twenty feet deep, situated on the batture, lately decreed and adjudged to John Gravier by the superior court holden in said city, have conveyed and transferred, and by these presents do convey and transfer unto James Brown and Samuel Brown, of said city, all my right, title and interest in and to a certain tract or parcel of land consisting of five acres front and forty acres deep, and situated at the English turn on the left bank of the Mississippi, be the same more or less, which said tract of land, I, the said Keene, purchased in the year 1805 of Helene Modeste Barbinnée Guinault, hereby warranting and defending unto the said James, and the said Samuel, all my right and title as aforesaid, and unto all persons claiming under them.

In testimony whereof, I hereto subscribe my name, this 21st day of August, A. D. 1807.

(Signed) RICHARD RAYNAL KEENE,
JAMES BROWN,
SAMUEL BROWN,
PIERRE PEDESCLAUX, *N're.*

I, Louis T. Caire, notary public, in and for the city and parish of New Orleans, do hereby certify that the foregoing is a faithful copy of the original deposited in the office of the late Pierre Pedesclaux, notary public in this city, and now in my custody.

In faith whereof, I grant these presents under my signature and the impress of my seal of office, at the city of New Orleans, on the twelfth day of May, one thousand eight hundred and thirty-eight.

(Signed) LOUIS T. CAIRE, *Not. Pub.* [SEAL.]

(Endorsed.) Filed June 7th, 1839.

(Signed) D. N. HENNEN, *Clk.*
by L. C. HORNSBY, *Dy. Clk.*

Sale from E. M. Guinault to R. R. Keene.

Aujourd'hui quinzième jour d'Avril de l'année mil huit cent cinq, la vingt neuvième de l'Indépendance Américaine avant midi. Pardevant nous Pierre Pedesclaux, notaire publique des Etats Unis d'Amérique à la Nouvelle Orléans, capitale du territoire d'Orléans.

Fut présente Demoiselle Elen Modeste Guinault, épouse du Sieur gros père Casimir Barbin Bellevue demeurant en cette ville et paroisse de St. Louis.

La quelle a par ces presentes, vendue, cédée, quittée et transportée *avec promisse de garantie de tous troubles, dettes, hypothèques et autres empechemens généralement quelconques,* ce que je certifie moi notaire annotateur quant à l'hypothèque.

Au Sieur Richard Raynal Keene, homme de loy, demeurant en cette ditte ville, ci-présent et acceptant pour lui, ses hoirs et ayans causes.

Une habitation située au détour des Anglais, à six lieues de cette ville et de même bord, composée de cinq arpens de face sur quarante de profondeur, joignant d'un coté à sieur Chapron et de l'autre au sieur François Wood, appartenant à la d. dame pour l'avoir en de son dit époux à compte de sa dote selon il est constaté par l'acte de séparation de biens entre la dite dame et son époux, reçu par devant maitre Narcisse Broutin le vingt huit de Mars passé.

La dite habitation ci-dessus vendue telle qu'elle se poursuit et comporte avec touts ses droits, issues, usages et servitudes, sans en rien réserver ni retenir, la quelle habitation, l'acquéreur a dit bien connaitre et dont il est content.

La présente vente faite et passée entre les parties aux clauses et conditions ci-dessus et en outre pour la somme de neuf cent piastres gourdes, que la ditte dame reconnait avoir recue comptant de l'acquéreur qu'elle a

quittée, et quitte, s'est desistée et séparée de tous ses droits de propriété sur la d. habitation en faveur de l'aequéreur, qu'elle en a saisi et revêtu pour par lui en faire, jouir et disposer à sa volonté, car ainsi, &c. obligeant, &c., soumettant, &c, renonçant, &c. dont acte et signé de leur consentement.

Fait et passé en notre étude à la Nouvelle Orléans les jour et au que dessus en présence des Sieurs Jean Baptiste Ramirez et Joachim Lozano témoins qui ont signé ainsi que les parties en présence de nous notaire Soussigné.

Signé: Helene Modeste Barbinnée Guinault, Richard Raynal Keene, Joaqn. Lozano, Jn. Bte. Ramirez, Pierre Pedesclaux, *not're.*

Pour copie conforme à l'original resté en mon étude pour recours en foi de quoi j'ai signé ces présentes et y ai apposé le sceau de mon office à la Nouvelle Orleans ce 8 Juin, 1839.

[SEAL.]

(Signed) LOUIS T. CAIRE, *Not. Pub.*

Endorsed—Filed June 8th, 1839.

(Signed) D. N. HENNEN, *Clk.*
By L. C. HORNSBY, *Dy. Clk.*

Letter from Brown to Keene.

PARIS, May 15, 1824.

DEAR SIR: I am sorry I am unable to add any thing to the statement I sent you on the subject of the lot promised me by Mr. Livingston in New Orleans. The state of your memory will account for the *imperfection of mine*, which I trust is not a matter of so much importance, when I feel fully persuaded the whole was reduced to writing. When last in New Orleans, Col. Davis applied to me on the same subject, and I told him that, as I had by a note to Mr. Livingston substituted you for myself as to any compensation for my argument in that cause, I had never said any thing as to my claim, but had left Mr. Keene to arrange it with Mr. Livingston. You knew the whole transaction just as well as I did, being in the habit of daily intercourse with Mr. Livingston and myself. Col. Davis told me he had bought the lot from you, but I did not ask him any questions respecting it. The size, situation and boundaries were never described, and I would not have made any disposition of it, had I not understood you as having conversed with Mr. Livingston and as consentnig to take it. I feel fully persuaded that on arriving at New Orleans you will find our contract reduced to writing. May you not have passed the order I gave you to substitute you for my expectations, from Mr. Livingston, to Col. Davis, and have forgotten it? Be assured of my dispositions that you should obtain all I promised, and the best evidence of that disposition is afforded by the fact, that I have never claimed any thing from Mr. Livingston. I passed merely all my interest without any ulti-

mate responsibility under the promise he made me to you, and left you to arrange it between you. I think the transaction must have taken one or two years before you left the country.

I am, sir, very respectfully,
Your most obed't ser't,

(Signed) JAMES BROWN.

Col. KEENE.

Endorsed—Filed June 8th, 1839.
(Signed) D. N. HENNEN, *Clerk*,
By L. C. HORNSBY, *Dy. Clk.*

Letter from Brown to Keene.

Mr. Brown presents his respects to Col. Keene, and returns him his passport, which is invested with all the forms necessary to its validity. The impropriety of issuing an American passport to one who at the time holds the paper you sent, must be obvious, on a moment's reflection, and the proposal to send one to Bordeaux, is utterly inadmissible.

Col. Keene will find the contract between himself and Mr. Brown in the office of Pedesclaux at New Orleans. It was drawn up, I think, by Lozano, who I believe yet resides there.

PARIS, May 13, 1824.

KEENE
vs.
BROWN's Executor. } Agreed that this be given in evidence.

(Signed) PRESTON.

Endorsed—Filed June 7th, 1839.
(Signed) D. N. HENNEN, *Clerk*,
By L. C. HORNSBY, *Dy. Clk.*

Sale from S. B. Davis to Jno P. Jones.

At the city of New Orleans, in the State of Louisiana, on this *sixteenth day of March, in the year of our Lord one thousand eight hundred and twenty-two*, and of the Independence of the United States of America the forty-sixth, before me, Hugues Lavergne, notary public, duly commissioned and qualified in and for the city and parish of New Orleans, residing therein, and in the presence of the subscribing witnesses hereinafter named:

Personally appeared Samuel B. Davis, of this city, who has granted, bargained and sold, and by these presents doth grant, bargain and sell, *without any warranty whatever*, excepting, however, the warranty resulting from his own personal acts, unto John P. Jones of this city, here present, and accepting for himself, his heirs, executors and assigns, all the rights of the said vendor to that undivided half of that part of the *batture*, situate in front of the suburb St. Mary, between Gravier and Poydras streets, and bounded by Levee street and Tchoupitoulas street,

and at the lower limit thereof by lots number six and eight, and on the upper side by lots number nine and ten, to which said undivided half the said vendor is entitled jointly with Wilkins and Linton, of this city, merchants, the whole conformably to the plan in this office, under date of the twenty-ninth of November, one thousand eight hundred and twenty, drawn by Joseph Pilié, city surveyor, and by virtue of the following titles, to wit: 1°, of a purchase made by the said Samuel B. Davis from Winter and McCall, of this city, merchants, by act before the undersigned notary, under date of the fifteenth of February last past. 2d°, of the sale made to Winter and McCall, and Wilkins and Linton, jointly, by Jean Baptiste Poeyfarré, before Marc Lafitte, notary public, of this city, on the first of June, eighteen hundred and eighteen. 3°, of the compromise entered into between them, the said Winter and McCall, and Wilkins and Linton, and the corporation of New Orleans, by act before the undersigned notary, under date of the twentieth of September, eighteen hundred and twenty. 4°, and also by virtue of the partition made between them, the said Winter and McCall, and Wilkins and Linton, and the heirs Bertrand Gravier represented by James Pitot, as appears by an act to that effect before Michel De Armas, notary public of this city, under date of the twelfth of June, eighteen hundred and twenty, reference being had to the plan annexed to this last act; which said rights of the said vendor to the batture as above described are *not warranted* by him to the said purchaser, *it being well understood that the said purchaser shall be bound to defend the title or titles establishing the rights of the said vendor to the batture aforesaid, without any recourse against the said Samuel B. Davis, in case of eviction or any other hindrance or hindrances whatsoever:* the said John P. Jones declaring that he accepts of the sale and transfer unto him of the said rights of Samuel B. Davis to the *batture* as above mentioned, *without any guarantee on his part, and that he renounces all claims and actions against the vendor in case he should be disturbed in the peaceable possession and enjoyment of such part of the said batture to which he is entitled by this act, and furthermore declaring that he doth hereby bind himself to defend the same at his own risk, peril and fortune;* the said purchaser acknowledging that he is perfectly acquainted with the premises presently sold, and does not wish for any further description or designation of the same.

This sale is made for and in consideration of the sum of *ten thousand dollars* current money of the United States of America, which sum the said purchaser doth hereby promise and obligate himself to pay to the said vendor in twenty years from the date of these presents; this sale is likewise made for and in consideration of *an annual ground-rent charge of ten per cent.*, that is, of one thousand dollars on the said capital sum of ten thousand dollars, which rent the said purchaser doth hereby obligate himself to pay *quarterly* to the said vendor, that is, *one-fourth* at the expiration *of every three months* from this day; it being well understood that the said purchaser shall be at liberty to redeem the said rent before the aforesaid twenty years shall have elapsed at any time he will think it proper: provided, that all sums which shall be paid by him to the said

vendor in deduction of the said principal sum of *ten thousand dollars* shall never be less than one thousand dollars; which payment or payments thus paid by the said purchaser shall have the effect of lessening, in ue proportion of the sums paid, the aforesaid ground-rent charge at the rate of *ten per cent.* as above stipulated, and shall be mentioned in the margin of this act by the undersigned notary, or any of his successors in office, at the request of any of the contracting parties.

And it is expressly agreed between the contracting parties that in case the aforesaid ground-rent charge should not be exactly paid on the falling due of two consecutive quarters of the same as above stipulated, then the said vendor shall have the right to cause the present sale to be dissolved and annulled by any competent court, the said purchaser hereby expressly renouncing to all the laws in his favor in case of such a suit.

And for the better securing the payment of the aforesaid capital sum of *ten thousand dollars*, and of the annual ground-rent charge above mentioned of one thousand dollars, the said purchaser doth by these presents specially mortgage and hypothecate by privilege and preference in favor of the said Samuel B. Davis, here present, and accepting all the aforesaid portion of *batture* above described and presently sold, together with all and singular the houses, edifices, buildings and other improvements generally whatsoever, without any exception or reservation, to be *hereafter* built, erected, made, constructed and established on the said premises; the said purchaser giving, by these presents, full power to the recorder of mortgages of this city to enregister this mortgage against him in favor of the said Samuel B. Davis.

And under the reservation of this privilege, and of all other rights stipulated in these presents, the said Samuel B. Davis doth hereby transfer and set over unto the said John P. Jones, all rights of property which he has or may have on the above described undivided half part of the *batture*, wishing and consenting that the purchaser should take immediate possession of the same, and giving him full power to that effect, to the end that the said purchaser should frelye make, enjoy and dispose of the premises as fully belonging to him, his heirs, executors and assigns, by virtue hereof. Although from the certificate of the recorder of mortgages delivered on this day, it appears that there are no mortgages recorded against the vendor on the premises now sold; the said vendor has informed the purchaser, that by an act before the undersigned notary, under date of the twentieth of September, eighteen hundred and twenty, there exists on the property now sold a mortgage against Winter and McCall, in favor of the corporation of New Orleans, to secure the payment of two hundred seventy-two dollars ninety-one cents and two-thirds, and the said vendor likewise satisfied the purchaser that by the deed of sale in this office, above recited, passed between him and Winter and McCall, the latter have given him *a sufficient security for the raising of the said mortgage* in the month of September next.

Thus done and passed in my office, in the presence of Jean Baptiste Desdunes, junior, and Charles Janin, witnesses, residing in this city, and requested to be present, who, together with the contracting parties and

me, the said notary, signed these presents after the same had been read and fully understood

Original Signed: Saml. B. Davis, John P. Jones, J. B. Desdunes, fils, Charles Janin, H. Lavergne, *not. pub.*

I certify the foregoing to be a true copy of the original act extant in the records of my office, as successor of Hugues Lavergne, late notary public. In faith whereof I grant these presents, under my signature and seal of office, this twenty-second day of November, A. D. 1838.

[SEAL.] (Signed) WM. CHRISTY, *Not. Pub.*

Endorsed—Filed 7th June, 1839.

(Signed) D. N. HENNEN, *Clerk*,
By L. C. HORNSBY, *Dy. Clk.*

Document marked A.

THE UNITED STATES DISTRICT COURT,
Eastern District of Louisiana.

The testimony of S. P. Moore proves that the said James Brown declared in his presence, in the year 1807, that he, the said Brown, had derived a benefit amounting to the sum of eight thousand dollars, from the property which he received from the said Keene in exchange for a batture lot.

It is admitted that the dimensions above stated, to wit, sixty feet front and one hundred and twenty feet deep, constitute, according to the customary sense, one full or entire lot.

It is also admitted that the said Keene ceased to reside in Louisiana in 1807; that he returned to New Orleans in the beginning of 1830; left it in July of the same year, and returned again in March, 1832.

(Signed) RICHARD RAYNAL KEENE, *P. P.*
(Signed) ISAAC T. PRESTON, *Atty. for the Deft.*

I certify the foregoing to be a true copy, May 22d, 1839.

[SEAL.] (Signed) J. Q. O. HOIT,
Dy. Clk. U. S. Dist. Court, Eastern District of Louis.
For JOHN WINTHROP, *Clerk.*

Endorsed—Filed June 7th, 1839.

(Signed) D. N. HENNEN, *Clerk*,
By L. C. HORNSBY, *Dy. Clk.*

Document marked B.

R. R. KEENE
vs.
I. T. PRESTON, exr. of JAMES BROWN.

U. S. Circuit Court for the 9th circuit and Eastern District of Louisiana.

It is agreed that suit for the same subject matter for which this suit has

been instituted, was brought by plaintiff against said Brown in the U. S. district court of Louisiana, or eastern district thereof, in May, 1830, and that a non-suit therein was entered June 1st, 1831.

(Signed) ISAAC T. PRESTON.

Endorsed—Filed June 7th, 1839.

(Signed) D. N. HENNEN, *Clerk*,
By L. C. HORNSBY, *Dy. Clk.*

And he also introduced S. J. Peters and Florence, who testified that they were acquainted with the present value of batture lots situate in suburb St. Mary, and that the lowest value of a 60 feet lot was fifteen thousand, and the highest value forty-eight thousand dollars cash. The plaintiff gave in evidence the following

Depositions of John C. Harrison.

R. R. KEENE *vs.* ISAAC T. PRESTON, exr. of JAS. BROWN. } Commission from the U. S. Circuit Court, 9th Judicial District Court, Eastern District of Louisiana.

John C. Harrison, a witness for the plaintiff, being sworn, saith, that he has been residing in New Orleans as a commission merchant for seven years past; during this time he has been the holder of New Orleans batture property; thinks the value of a batture lot, 60 by 120, any where between Tchoupitoulas street and the river Mississippi, the selection of the best thus located, would be worth $1,000 a front foot; the minimum value in the same range of batture would be worth (the range here spoken of is included between Canal and De Lord streets) about $500 the front foot.

Cross-examined, says, a naked batture lot 60 by 120 on Tchopitoulas street, any where between Julia and St. Joseph's, would be worth about $300 a front foot; on one of the cross streets, on St. Joseph street, for example, worth $200 a front foot.

(Signed) JOHN C. HARRISON.

We, the undersigned parties to the above entitled suit, agree that the aforegoing evidence be read and received in said suit.

(Signed) R. R. KEENE,
(Signed) ISAAC T. PRESTON, *exr. of Brown.*

STATE OF LOUISIANA,
City of New Orleans.

I hereby certify, that on Monday the 13th May, 1839, at 4 o'clock, P. M., I have caused to come before me at my office, No. 60, Royal street in New Orleans, John C. Harrison, a witness for the plaintiff in a certain suit now pending in the U. States circuit, ninth circuit court for the

eastern district of Louisiana, wherein R. R. Keene is plaintiff, and Isaac T. Preston, executor of James Brown, is defendant; and the said witness was duly sworn by me to tell the truth, on the questions put to him in the said cause, and his said deposition was reduced to writing by me in his presence, and subscribed by him in my presence, and is hereto annexed. Done in presence of R. R. Keene, plaintiff, and Isaac T. Preston, defendant.

In witness whereof, I have hereunto put my name and affixed my private seal this 13th May, 1839.

(Signed) O. P. JACKSON, *Judge*. [SEAL.]

Addressed

R. R. KEENE *vs.* I. T. PRESTON, Exr. of JAMES BROWN. } To the clerk of the United States Circuit Court, Ninth Judicial District for the Eastern District of Louisiana.

Endorsed—Opened and filed in open court this 7th June, 1839.

(Signed) D. N. HENNEN, *Clerk*,
By L. C. HORNSBY, *Dy. Clerk*.

Letter of Keene to Brown.

PARIS, May 13th, 1824.

DEAR SIR: To avoid mixing a private subject with one (that of my passport) on which I have addressed you in your public character, I send you this note apart, merely to beg of you the favor of such a paper as would enable to establish my right and title to the lot in New Orleans, that we bargained for before I left that place. In testimony of my remembrance of our former friendship, I shall send you from the United States an exposition, the publication of which I shall cause to be made as soon as I shall arrive there; which, whilst it will prove the falsehood and malice that have been employed against me, will also contain some documents relative to an old intrigue which, as well as I recollect, was attempted to be made detrimental to yourself as well as to many of your friends.

I remain, most respectfully,
Your most obed't servant,

(Signed) R. R. KEENE.

JAMES BROWN, Esq. &c., &c., &c.

The defendant gave in evidence the following:

Agreement between Gravier and Delabigarre.

Aujourd'hui, vingt-septieme jour du mois de Mars, de l'année mil huit cent-quatre, la vingt huitième de l'Indépendance Américaine apres midi.

Par devant nous Pierre Pedesclaux, notaire public des Etats Unis d'Amérique à la Nouvelle Orléans, capitale de la Louisiane, fut présent le Sieur Pierre Delabegarre, habitant à la Nouvelle York, Nord Amérique, actuellement en cette ville paroisse de St. Louis ; lequel nous a présenté un acte, sous signature privée, écrit sur une feuille de papier ouverte, commençant par ces mots. Par le contrat, et finissant par ceux, daté en son principe du vingt du présent mois de Mars, signé enfin Jean Gravier, Peter Delabegarre, Eugene Dorsiere, témoin M. F. Caroline Guillotte, le dit acte, portant vente par le dit sieur Jean Gravier, au dit sieur comparant de toutes les terres, formant batture renfermées entre le chemin, le fleure, Madame Delord Sarpy et la ville, le tout faisant front aux domaines de l'habitation du dit Jean Gravier, sous les réserves expliquées au dit acte sous signature privée, le tout moyennant la somme le dix mille piastres payables en deux termes égaux, au quel acte le dit sieur comparant nous a requis le dépôt en notre étude pour y avoir recours en cas de besoin ce que nous lui avons octroyé après avoir signé et paraphé en sa présence le dit acte sous seing-privée ne varietur dont et de tout ce que dessus nous avons dressé le présent pour servir et valoir ce que de droit. Et jugé de son consentement fait et passé en notre étude les jour et an que dessus en présence des Sieurs Jean Baptiste Ramirez et Joachim Lozano temoins a ce requis et appelés qui ont ainsi que le comparant signé en présence de nous notaire Soussigné.

La minute est signée Peter Delabegarre, Jean Baptiste Ramirez, Jo. Lozano, Pierre Pedesclaux, N're.

Annexé.

Par le contrat fait le vingtième jour de Mars, mil huit cent quatre entre Jean Gravier de la ville de la Nouvelle Orléans, d'une part, et Pierre Delabegarre de la ville de la Nouvelle York, de l'autre part, il appert qu'en consideration de la somme de dix mille piastres, payables au dit Jean Gravier aux époques suivantes, savoir, cinq mille piastres dans le cours de six mois à compter de la même date des présentes et les cinq autres mille piastres dans le cours de dix, huit mois á compter de la même date, le dit Jean Gravier a accordé, vendu et aliéné et par ces présentes accorde, vend et aliène au dit Pierre Delabegarre à ses héritiers ou ayans cause deux tiers indivises de toute cette partie de terrain ou parcelle des terres situées sur la rive du fleuve de Mississippi, et formant le front de la plantation du dit Jean Gravier, maintenant appelé faux-bourg Ste. Marie, et s'étendant depuis les limites de la ville de la Nouvelle Orleans, le long du dit fleuve aussi loin que peut ou doit le faire la plantation du dit Jean Gravier, les quelles sont bornées à l'Ouest par le grand Chemin, ou route conduisant vers le haut du dit fleuve, au Nord par les limites de la dite ville ; au sud par les limites de la plantation de la veuve Delord, et à l'Est par le courant du dit fleuve Mississippi, exceptant et réservant seulement une partie des terrains qui forment la devanture de l'islet a Claude François Girod et une autre partie de deux terrains, vendus à Pierre Fouchet toute cette partie de terrains ou parcelle de terres ainsi vendus au dit Pierre Delabegarre, contenant en front sur

le dit grand chemin guarante trois lots de soixante pieds de front plus ou moins formant cinq islets et comme les dits quarante trois lots se comportent et etendent ensemble avec toutes les appartenances des dites terres et quelconques, comme aussi tous les droits, titres, et prétentions ou demandes quelconques du dit Jean Gravier dans les deux tiers indivises ainsi vendus, reversions, résidus, ventes ou profits qui peuvent en résulter afin par le dit Pierre Delabegarre, ses héritiers ou ayant cause de posséder par les dits deux tiers indivises, des dites par celles des héritiers ou ayant cause, pleine et entière jouissance, benefices et propriété pour toujours, et le dit Jean Gravier par ces présentes s'engage personellement, ses héritiers, exécuteurs et administrateurs et convient avec le dit Pierre Delabegarre ses héritiers ou ayant cause de la manière et dans la forme suivante: savoir, que le dit Jean Gravier est veritablement et suivant la loi seul propriétaire des dits terrains ainsi vendus et qu'il a plein pouvoir d'en disposer et que ces mêmes terrains sont maintenant libres, nets, et léchargés de toute espèces d'hypothèques autérieures, ou demandes quelconques; et, finalement, que le dit Jean Gravier guarantira et pour toujours défendra les dites terres ainsi vendues au dit ayant cause en foi de quoi les sous dites; et yont apposés leurs cachets les jour et au que dessus.

(Signed) JEAN GRAVIER,
PETER DELABEGARRE.

Scellé et delivré en présence d'Eugene Dorsiere, tèmoins Me. F. Caroline Guillotte.

Pour copies conformes à la minute et à la pièce y annexée, deposés en mon étude pour recours, en foi de quoi j'ai signé le présent et apposé le sceau de mon office à la Nouvelle Orléans, le seize Juin mil huit cent trente.

(Signed) LOUIS T. CAIRE, *Not. Pub.*

Signé et paraphé ne varietur au désir de l'acte de dépot de ce jour, Nouvelle Orléans, ce vingt septième jour de Mars de l'année mil huit cent quatre, le vingt huitième de l'indépendance Américaine après midi.

(Signé) PIERRE PEDESCLAUX,
(Signé) LOUIS T. CAIRE, *Not. Pub.*

Deed from Delabegarre to Livingston.

Know all men by these presents, that I, Peter Delabegarre, late of the city of New York, do, by these presents, give, grant, release, and confirm, unto Edward Livingston, late of the city of New York, Esquire, and to his heirs forever, one undivided third of a parcel of land, two thirds whereof were this day conveyed to me by John Gravier, of the city of Orleans, and in his deed bearing even date with these presents; the whole of the said land is described as all those lots or parcels of land situate on the bank of the river Mississippi, and forming the front of the plantation of the said John Gravier, (now called the Fauxbourg St. Marie,) and extending

from the limits of the town of New Orleans along the said river as far as the plantation of the said John Gravier can or ought to extend; bounded on the west by the highway or road leading up the said river, on the north by the limits of the said city, on the south by the limits of the habitation of the widow De Lorandon, on the east by the current of the said river Mississippi, and receiving only a parcel of the said land which lies opposite to the square of Claude François Girod, and two lots sold to Pierre Fouchet; the whole of the said lands sold to the said Peter Delabegarre containing in front on the said high road, forty-three lots of sixty feet front each, more or less, forming five islets, and as far as the said forty-three lots contain and extend, together with all and singular the appurtenances to the said one undivided third part of the said land or lots of ground belonging, or in any way appertaining; to have and to hold the same undivided third part of the above described tract of land, with the appurtenances, as tenant in common, each for one equal undivided third part with me, the said Peter Delabegarre and John Gravier, to him, the said Edward Livingston, and his heirs and assigns, to his and their only proper use and behoof forever. In testimony whereof, I have hereunto set my hand and seal, this twenty-sixth day of March in the year of our Lord one thousand eight hundred and four.

(Signed.) PETER DELABEGARRE. [SEAL.]

Sealed and delivered in the presence of
JOHN THIBAUT.

Be it remembered, that on this 5th day of February, A. D. 1807, before me, Eliphalet Fitch, one of the notaries public of the territory of Orleans, residing in the city of New Orleans, personally appeared John Thibaut, to me well known, who being duly sworn, doth depose and say, that he did see Peter Delabegarre, the grantor named in the foregoing deed, sign, seal and deliver the same on the day the same bears date, and that the name John Thibaut, signed thereto as a witness, is in the proper hand writing of him the said deponent. Whereof I, the said notary, at the request of Edward Livingston, the grantee within named, have registered the said deed.

(Signed) JOHN THIBAUT.

I, Carlile Pollock, a notary public in and for the city of New Orleans, duly commissioned, do hereby certify the foregoing to be a true copy of an act on the records of Eliphalet Fitch, late a notary public in this city, deceased, said records deposited in my office. In faith whereof I grant these presents under my signature and seal of office, at New Orleans, this 18th June, one thousand eight hundred and thirty.

CARLILE POLLOCK.

Partition between Edward Livingston and Trustees of Delabegarre.

Pardevant nous John Lynd dûment autorisé et commissionné notaire public, pour la ville et paroisse de la Nouvelle Orléans, second district

sénatorial de l'Etat de la Louisiane, et en présence des témoins ci-après nommés et soussignés. Est comparu Mr. Edward Livingston, avocat demeurant en cette ville, lequel a requis de nous, Notaire, la transcription sur le registre courant, des minutes de notre office, d'un accord sous seing privé écrit sur une feuille entière, et remplissant les quatre pages, daté du quatorze Aout mil huit cent sept, et passé entre lui dit requérant et les executeurs testamentaires du feu Pierre Delabegarre, à la quelle requisition, nous dit notaire ob tempérant avons transcript fidèlement le dit accord comme huit.

"Articles of agreement, sale, and partition between Edward Livingston of the one part, and Blais Cenas, Barthelemy Lefon and Lairrière Latour, trustees under the will of Peter de Labegarre, deceased, of the other part."

Whereas, Daniel Clarke, Nicholas Girod, and Hypolite Ladotte, referees mutually chosen between the parties to these presents, to appraise the relative value of certain parcels of land called the batture, in front of the suburb St. Mary, held in common between said parties, have made a certain report, dated the day of August instant, which we the said parties have agreed shall serve as a basis for the partition of the said property; and whereas, block number three, mentioned in said partition, consisting of twenty-four lots and the space between them and the river to the water's edge, at the channel of the river, colored red on the map made for the said estimation, has by mutual consent been assigned to the said Edward Livingston, charged with the payment of six thousand one hundred and sixty-nine dollars, payable at the periods at which the instalments on a bond or obligation made by the said Peter Delabegarre to John Gravier for the consideration money of the said lands shall fall due respectively: And whereas, by the last will and testament of the said Peter Delabegarre, the said trustees are empowered not only to make partition of the said land, but to sell so much thereof as may be necessary to pay the incumbrance and necessary expenses, and to secure the title thereof: And whereas, the said land is encumbered to John Gravier for the sum of fifteen thousand dollars, of which four thousand only are to be paid by the said Edward Livingston, pursuant to his agreement with the said Peter Delabegarre, deceased, dated the day of in the year one thousand eight hundred and four: And whereas, two lots of land of sixty feet front and one hundred and twenty feet depth, each fronting on the present road, are by agreement to be conveyed to James Brown and Abner L. Duncan, respectively, and the sum of one thousand dollars is to be paid to Lewis Kerr, Esq., all three counsellors employed in prosecuting the claim of the said John Gravier to the said property: And whereas, sundry expenses have been incurred, and others will unavoidably accrue to secure the title and possession of the said property, now, therefore, the said trustees, pursuant to the powers vested in them by the said will, have agreed to sell, and do hereby grant, bargain, sell, convey, and make over to the said Edward Livingston, his heirs and assigns for ever, all that part of the said batture which lies between the ancient limits of the town and the said block number three, which begins

opposite to the house of Julien Poydras; and they do hereby, in pursuance of the partition aforesaid, release, quit claim and assign to the said Edward Livingston, his heirs and assigns for ever, all that part lying and being between block No. two, and the block conveyed to the said Edward Livingston by John Gravier, lying between Girod and Julie streets, so that the said Edward Livingston, by virtue of this sale and release, may enjoy, as his separate property, to him and his heirs, of all that part of the said batture so held in common between him and the said Peter Delabegarre, which is bounded on the one side by the ancient limits of the city of New Orleans, on the second side by the street or high way in front of the side suburb St. Mary, on the third side by the land or block heretofore sold to the said Edward Livingston by the said John Gravier, lying between Girod and Julie streets, and on the fourth side by the bed or channel of the Mississippi river. And the said Edward Livingston hath agreed to release, and doth hereby release, quit.claim, and assign to the said trustees, all his right, title and interest, to the blocks numbered on the map aforesaid, with numbers four, five, and six, the part opposite thereto on the said map, colored red, between them and the river, being reserved for the further division, to hold the said blocks or squares subject to the trust contained in the said will. The said sales, and whereas, being made on the following considerations and terms, to wit, on the part of the said Edward Livingston: 1st. That he shall pay to the said John Gravier the whole of the said sum of fifty thousand dollars at the several periods stipulated in the sale of the said Peter Delabegarre. 2d. That the said Edward Livingston shall exonerate, and does hereby forever discharge, the estate of the said Peter Delabegarre of and from all demands for and on account of his professed personal services in the said suit in the supreme court aforesaid. 3d. That the said Edward Livingston shall pay to the said Lewis Kerr the sum of one thousand dollars so due to him as aforesaid. 4th. And finally, that the said Edward Livingston shall pay in final discharge of all sums due to the estate of the said Peter Delabegarre, on account of said joint property, the sum of eleven thousand dollars, in manner following: that is to say, one third in one month, one third in three months, and one third in six months from this date; and on the part of the said trustees, that they will convey to the said James Brown and Abner L. Duncan the said two lots of land respectively out of their proportions of the said batture. In witness whereof the said parties have hereunto set their hands and seals, this 14th day of August, A. D. 1807, made by triplicates, one copy to be deposited with the clerk of the city court, and one copy to be kept by each of the said parties.

(Signed) EDWARD LIVINGSTON, [HIS SEAL.]
B. CENAS, [HIS SEAL.]
LAFON, [HIS SEAL.]
A. LAIRRIERE LATOUR, [HIS SEAL.]

Sealed and delivered in the presence of
TH. PILIE,
A. TROUARD.

Des quel enregistrement et transcription le sieur comparant a requis acte à lui octroyé pour servir ce que de droit, et il a retiré l'original. Fait et passé à la Nouvelle Orleans, en l'étude le vingt Septième, jour d'Avril de l'anne mil huit cent dix huit la quarante deuxième de l'indépendance Américane, en présence de Messieurs Hugh K. Gordon et Jules Davezac, tous deux témoins domiciliés en cette ville qui ont ainsi que le requirant signé avec nous, notaire, lecture faite.

(Signé) EDWARD LIVINGSTON.
JULES DAVEZAC.
HUGH K. GORDON.
JOHN LYND, *Not. Pub.*

I do hereby certify the foregoing to be a true copy of the original extant in my office. In faith whereof I hereunto set my hand and affix my seal of office on this 14th day of December, A. D. 1830.

(Signed) G. R. STRINGER, *Not. Pub.* [SEAL.]

Judgment of the Supreme Court.

JOHN GRAVIER
vs.
THE MAYOR, ALDERMEN, AND INHABITANTS OF THE CITY OF NEW ORLEANS.
} Judgment of the Superior Court of the Territory of Orleans.

1st. The title of Bertrand Gravier, the ancestor of the plaintiff to the tract of land on which the fauxbourg St. Mary is situated, has not b en disputed, but it has been contended that this tract was bounded by the highway; the court, however, are of opinion, that, according to the evidence exhibited, and the general usage of the country, this tract of land was bounded by the river Mississippi.

2d. From the examination of the authorities, the court are of opinion, that according to the civil and Spanish laws, the right of alluvion is incident to land which is bounded by a navigable river, and that these laws must form the rule of decision in the present case.

3d. If Bertrand Gravier, therefore, had continued proprietor of the whole tract on which the fauxbourg has been established, there would be no difficulty in determining his title to the alluvion. But Bertrand Gravier had divested himself of all title to that part of his tract on which the fauxbourg is established, by selling the lots fronting and adjoining the highway; it is therefore important to inquire what was the situation of the batture or alluvion in question at the time the fauxbourg was established, or at least when the front lots were sold; for if no alluvion existed at that time when Bertrand Gravier ceased to be the owner of the land adjoining the high road, then, it is the opinion of the court that an alluvion subsequently formed would not become the property of Bertrand Gravier. The reason of this opinion is, that if Bertrand could be considered as proprietor of the road after selling the adjacent land, or of the levee lying between this road and a public river, he would, nevertheless, not possess that title of property which gives the right of alluvion; for the destruction

of this property by the encroachment of the river would be a public and not a private loss, since it could not be appropriated to the use of any individual, and the said road and levee would have become necessarily liable to be kept in repair at the public expense.

It is, however, the opinion of the court, from the evidence adduced in this cause, that antecedent to the time when Bertrand Gravier ceased to be proprietor of the land adjacent to the high road, that a batture or alluvion had been formed adjoining the levee, in front of the fauxbourg, upon the river; and that this alluvion was then of sufficient height to be considered private property, and had, consequently, become annexed to and incorporated with the inheritance of Bertrand Gravier.

4th. Bertrand Gravier having then acquired by alluvion the property now in dispute, it is to be considered, whether he has divested himself of his title to the same? The court are of opinion that he has not. The evidence of abandonment is merely conversation which passed a long time ago; it is not very explicit, and is much impaired by the circumstance of Bertrand Gravier having sold a part of his batture to the of the front proprietors. It would be dangerous to divest a man of his property upon evidence of such declarations without any proof of a consideration.

With respect to the claim of prescription, it is sufficient to observe, that there has been no exclusive possession on the part of the defendants, and consequently they have no title on this ground. There are indeed other strong objections to a prescriptive title in this case, but the one we have stated is considered as sufficient.

5th. With respect to the title of John Gravier, as founded on the inventory, appraisement and adjudication which have been adduced in evidence in this cause; it is the opinion of the court that they are not bound to determine the validity or invalidity of this title, *first*, whether John Gravier has purchased the whole or only inherited an undivided part; his claim to be quieted in the lawful enjoyment of the property in question against the adverse pretensions of the city to the property of the soil on the right of carrying it away, is sufficiently strong to enable the court to form a decision of the present case. It is therefore ordered, adjudged and decreed by the court that the petitioner be quieted in his lawful enjoyment of the batture or alluvion described in his petition, against the claims and pretensions of the defendants, and that the injunction heretofore granted in this case be made perpetual.

District Court.

A true copy, 7th June, 1839.

(Signed) P. LE BLANC, *Dy. Clerk.* [SEAL.]

Endorsed—Filed, June 7th, 1839.

(Signed) D. N. HENNEN, *Clerk,*
by L. C. HORNSBY, *Dy. Clerk.*

Notarial Copy of Order of Brown to Delabegarre.

STATE OF LOUISIANA, CITY OF NEW ORLEANS:

Be it known that this day before me, William Christy, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn.

Personally came and appeared Hilary B. Cenas of this city, son of the late Blais Cenas, who presented me, notary, a letter from James Brown to Lafon and his said late father as executors of P. Delabegarre, which letter he declared he found among the papers of his said late father; and as it might be of some importance to Richard Raynal Keene, to whom it was his intention to deliver it, he desired that I should record a true copy thereof, which letter is in the words and figures following, to wit:

"NEW ORLEANS, Aug't 22d, 1807.

"GENTLEMEN: Mr. Richard Raynal Keene, in consideration of a deed executed by him to Doctor Samuel Brown and myself yesterday at the office of Peter Pedesclaux, is become the owner of a lot on the batture due to me from Edward Livingston, Esq.; you will, therefore, oblige me by executing to him the necessary deeds to convey the property.

I am, with respect, your most obedient servant,

(Signed) JAMES BROWN."

"Messrs. Lafon and Cenas, ex'rs of P. Delabegarre."

Which letter, after having been thus recorded, was delivered by me, said notary, to the said Richard R. Keene, who, being present, acknowledges the receipt thereof.

Thus done and passed in my office at the city of New Orleans aforesaid in the presence of W. G. Latham and F. B. Vinot, witnesses of lawful age and domiciliated in this city, who hereunto sign their names, together with the said appearers and me the said notary, on this eleventh day of March, in the year of our Lord one thousand eight hundred and thirty-seven.

Original signed: Richard Raynal Keene, H. B. Cenas, *Not. Pub.*
W. G. Latham, F. B. Vinot, Wm. Christy, *Not. Pub.*

I certify the foregoing to be a true copy of the original act extant in my register. In faith whereof, I grant these presents under my signature and the impress of my seal of office, at the city of New Orleans, this twentieth day of March, 1837.

(Signed) WM. CHRISTY, *Not. Pub.* [SEAL.]

Endorsed—Filed, June 7th, 1839.

(Signed) D. N. HENNEN, *Clerk*,
by L. C. HORNSBY, *Dy. Clerk.*

And proved by H. B. Cenas that his father died in 1812, and that the said paper was found by him in old papers of his father about the time it

was presented to the notary; he had never seen it until that time, and did not know how his father became possessed of it.

The defendant gave in evidence the following

Letter of Keene to Brown.

R. R. Keene, in answer to Mr. Brown's second note of this morning, could not certainly but feel gratified by receiving from Mr. B. the fullest statement on the subject of the lot in N. O. that Mr. B.'s memory w'd enable to give, as were before K. embarks for the U. S. it might so turn out, that on having an authentic description of said lot, its situation and probable value and his right to the same, he would have it in his power to make a transfer of it, as for instance to Brommer de Clark (who resides in Bordeaux), or to some Louisianian who might be met with there; such a description that might also be useful to K. in his own person or in that of an agent in N. O, for having proper steps resorted to for taking possession of it; for after such a lapse of time, and the hurty curty scenes through w'h K. has passed, he has no recollection of any of the particulars; he expects, therefore, such a description of the case as Mr. B. can conveniently give, will be thankfully received. K. in *in* mentioning another subject in his note of this morning had no idea of tendering a superfluity to Mr. B., nor on the other that of supposing that Mr. B.'s connections required his (K.'s) aid to render them more satisfactory. K. merely adds, the spirit he alludes to, that of ancient and sincere friendship, was the only one, that influenced him to make the tender in question.

May 15th, 1824.

Endorsed.

Filed at request of defendant's counsel, R. H. Chinn, June 26, '39.

(Signed) HENNEN, *Clk.*

Letter of Keene to Brown.

PARIS, Rue de Richelieu, Hotel d'Espagne, *May* 14*th*, 1824.

SIR: As upon reflection, particularly with your last note before me, my memory is so far refreshed as to be able to recollect that in or about 1807, I conveyed to you, in New Orleans, a tract of land in or near the English turn, about five leagues below that city, on the left bank of the Mississippi, for which I was to receive as the equivalent on your part a lot of ground in the batture—the same lot that Edward Livingston, Esq. was to give you for your services in his favor, in the batture cause. Now, as that lot was not transferred to me when I left Louisiana, on account of the embarrassed state in which the batture then was, on account also of my expectation at that time to see you again in New Orleans, I avail myself of the casualty that has brought us together in this place, to

request of you to have the goodness to subjoin to this note a statement of the purport of the one contained in the accompanying paper, whereby I may be authorized to call upon Mr. Livingston for the transfer of the lot in question, without the necessity of our having to carry on any correspondence across the Atlantic upon the subject.

I am, sir, your most ob't h'ble serv't.

(Signed) RICHARD RAYNAL KEENE,
Ex-Colonel in the late Constitutional Service of Spain.

To his Excellency, James Brown, Ambassador of the United States near his most Christian Majesty.

The purport alluded to in the accompanying letter—Mr. Brown, of course, making the terms to suit himself.

Edward Livingston, Esq., of New Orleans, or his representative, as requested in the foregoing note, will transfer or cause to be transferred to (naming K.) or his representative the lot referred to in said note, in virtue of the consideration therein mentioned.

Endorsed—Filed 7th June, 1839.

(Signed) D. N. HENNEN, *Clerk.*
By L. C. HORNSBY, *Dy. Clerk.*

Letter of Keene to Brown.

May 15th, 1824.

Dr. Sir: On looking over your note of this morning a second time, I see what I overlooked in the hasty reading I gave it on receiving it, to wit: That at the time of our agreement, or before you left N. Orleans, *you told Col. Davis that you had given a note to Mr. Livingston to substitute me for yourself as the owner of the batture lot*, the same that forms the subject of our correspondence. Now if that note should have been mislaid by Mr. Livingston (which is by no means an unlikely thing) what redress shall I have in calling on him for a conveyance of that lot? Why, I must write from Louisiana to Paris, to get a duplicate of it from you. But now that I am in the same place with you, is it not reasonable for me to expect of you such a duplicate? Great inconvenience may be prevented by it, and no evil can arise from it. Like a bill of exchange, a hundred sets may be given of it without any injury to any person. You can easily state in this duplicate that it is given *to have effect only in case the original has not been made operative.* But as our lives are all uncertain, I do conceive that in this duplicate you ought to mention your receipt already of the equivalent, *for it may very well appear in the deed I gave you at Pedesclaux for the ground at the E. turn, that no mention whatever is made of the batture lot (altho' you and myself well know that this was the consideration to be given to me) but only a valuable consideration of a dollar, without any other specification whatever.* This is an event highly probable. I know that you would never take any advantage of this defect. But in the supposition of your decease, what

might not your heirs or executors do, in utter ignorance of the previous circumstances. No person knows better than yourself what accidents and even disasters have arisen from want of caution in contracts, or rather the omitting to carry these into effect according to the bona fide intentions of the original parties concerned. It appears, therefore, so reasonable, that you should give me the duplicate order to Livingston, under the restriction or with the proviso mentioned, that you must excuse me for insisting as I do, most decidedly, upon having it before I leave Paris, which is as likely to be within a day or two as within a week or two. No injury, I repeat, can positively result to you in giving it, whilst much might accrue to me for the want of it.

As to Davis, he can possibly have no claim on you; and as to myself, I certainly feel assured that he has none on me. Since the morning, I have reflected more on the part relating to him than I have done for the last 13 years, and have recalled to mind the following circumstances. In the latter part of 1807, or about August or September, when I was about to go for Ellen, to the northward, Davis and myself conversed about an exchange of the batture lot, for, as I understood, a small *sugar*, and not a cotton plantation (as I erroneously mentioned this morning) below Jentilly's; and under this impression, a deed of exchange was made out at Pedesclaux's with the express mention of a *sugar* plantation, or rather a deed of conveyance to me from Davis of *such* a plantation, *but Davis never executed it*. In the same period I satisfied Thos. Elmes of my being about to render a signal service to the Capt'n Gen'l of Cuba, in respect of a Power with which Spain was then at war, and of the consequent facility I should have to sell in the Havana a cargo of Kentucky tobacco, provided it was of the best quality. He professed to sell me such, asking for it $6 pr. 100wt., whilst the common price was about $4 or 4½. I gave him a lien upon the cargo, and also made over to him as collateral security some property in Louisiana, among which was mentioned the *sugar* plantation of Davis; for the deed for conveying it to me was already before made out, and I had Davis's promise to sign it. I went to the Havana. The tobacco, thro' great favor, was received into the Royal factory for purchase, the lowest price for prime Kentucky tobacco being $14 pr. 100wt. in cash; but instead of prime tobacco, the far greater part of it turned out to be *trash*, and *as such, was condemned and burnt*. In 1811, when I returned from Spain to Havana, an agent, Benjamin Chardon, of Corp, Ellis & Shaw, of N. York, to whom Elmes had transferred his claim on me, presented against me a demand for $18,000 on acc't of that claim. As Chardon carried out letters of introduction to all the American merchants in the Havana, I empowered him to appoint any three of them that he should like best, as arbitrators to decide upon his claim and upon my counter claim. He did so, naming Mr. Murdoch, of Philadelphia, Mr. Lawrens, of N. York, and Mr. Savage, of Boston, all gentlemen and merchants of the first respectability. Chardon and myself bound ourselves under the penalty of $20,000 to abide by the award, an award which was given to me or in my favor for $1,350, and paid by Chardon. In the discussion of the case, a judicial document appeared

among the papers furnished by Elmes from N. Orleans, setting forth that Saml. Davis had never conveyed to me any plantation at all in Louisiana, nor had he any sugar plantation in the place described. The truth must have been that Davis, when he went to sign the deed of exchange of our respective properties, saw that he could not or ought not to sign any such deed, as not possessing the property (the *sugar* plantation) described in that deed to be sold by him. Thus, then, fell to the ground the talked of exchange between Davis and myself. And since the date of the aforementioned document sent to the Havana by Elmes, I certainly have had no sort of communication whatever with Davis, so that he can possibly have no claim on me for the lot in question.

I am, most respectfully, y'r ob't h'ble serv't.

(Signed) R. R. KEENE.

Jas. Brown, Esq. &c. &c.

Endorsed—Filed, June 7th, 1839.

(Signed) D. N. HENNEN, *Clerk*.

By L. C. HORNSBY, *Dy. Clerk*.

Letter of Keene to Brown.

DR. SIR: As my object, as already mentioned, was merely to show my right from you to be your substitute, for receiving the conveyance from or thro' Mr. Livingston, of N. Orleans, of the lot in the batture of that city, which he promised to you for your services in the batture cause; and as the equivalent given you by me, I considered and still consider as an essential circumstance or fact that ought to be acknowledged by you for enabling me to receive the conveyance in question, and as that equivalent consisted of a tract or parcel of land in the English turn, near N. Orleans, over which you must have exercised dominion or ownership, I cou'd therefore wish, tho' I am really sorry to trouble you, that you would do me the favor of having received the equivalent as stated. I recollect well to have arranged in conversation with Mr. Davis about an exchange of the forementioned lot for a cotton plantation, (a very small one, I believe) below the E. turn. But as I left N. Orleans before the exchange was effected, and as in fact Davis held back on acc't of the violent possession that immediately thereafter was taken of the batture by Mr. Jefferson's order, I have ever considered that the aforesaid conversation between Davis and myself, thro' his own act, fell to the ground, and was left without force.

I am, sir, very respectfully, your most ob't h'ble serv't,

(Signed) R. R. KEENE.

Paris, May 15, 1824.

H. E. JAMES BROWN, &c., &c.

Endorsed—Filed 7th June, 1839.

(Signed) D. N. HENNEN, *Clerk*.

By L. C. HORNSBY, *Dy. Clerk*.

Letter of Keene to Brown.

PARIS, *May* 17, 1824.

DEAR SIR: Your last note I conceive to be such as will answer my main purpose, as already explained. I certainly have no hesitation in acknowledging that your responsibility about the batture lot does not extend beyond your substituting me for yourself, in respect to the conveyance to be made by Mr. Livingston in the sense explained by you.

Now, having arrived at the satisfactory clause of this business, I rely on your goodness for submitting to your inspection the accompanying certificate of General Quiroga, which shows the spoliation I sustained of 19,500 dollars in the cause of the S. Constitution, without any indemnity or reimbursement whatever—a spoliation that has caused me to be placed here in a foreign country, without the means, absolutely, of going on to Bordeaux, much less to the Havana, where I have some funds. If then you could do me the signal favor to lend me two hundred dollars, to enable me to get on to the Havana, I will most assuredly refund it to you from that place, in any manner you may now direct; and be persuaded that *the favor will not be thrown away.*

I will at the same time, besides my separate obligation, endorse to you a promissory note of Mr. Hackley, of New York or Richmond, (the brother-in-law of T. M. Randolph, formerly American Consul in Spain,) for three hundred dollars, as an additional security for your reimbursement.

I am, most respectfully,

Your very obedient humble servant,

(Signed) R. R. KEENE.

P. S. As my letter of Saturday evening last might hereafter, by possibility, fall into other hands than your own, I would just remark that the favor I rendered the Captain General of Cuba in 1807, that obtained for me the entry and sale, in the Royal factory of the Havana, of New Orleans tobacco, was the carrying from New Orleans to the Havana a relation of his whom he desired much to have with him, and whom no merchant in New Orleans would suffer to go in his vessel for fear of its being discovered by the English.

JAMES BROWN, Esq. &c. &c.

Endorsed—Filed 7th June, 1839.

(Signed) D. N. HENNEN, *Clerk*,
By L. C. HORNSBY, *Dy. Clerk.*

Copy of Assessment Rolls of taxable property.

Statement of the property assessed in the name of Edward Livingston and the heirs of Delabigarre, to wit: Madame M. L. Stewart, and Miss A. L. Delabigarre, extracted from the Assessment Rolls of the Parish of Orleans, from the year 1819 to the year 1830 inclusive.

Years of Taxes.	Names.	Situation.	Value.	Folio.	Taxes.
Year 1819,	Edward Livingston or others,	1st District F. B. St. Marie,	8,000	42	$15 44
	"	"	30,000	43	57 90
	"	"	40,000	43	77 20
	"	"	16,000	43	30 88
	"	"	6,000	43	11 58
	"	2d District, Square 26,	4slaves	53	4 00
					$197 00
Year 1820,	Edward Livingston or others,	1st Dist. Bature F. B. St.Marie	8,000	47	16 64
	"	"	30,000	47	62 40
	"	"	40,000	47	83 20
	"	"	16,000	47	33 28
	"	"	6,000	48	12 48
	"	2d District, Square 26,	4slaves	58	4 40
	"	1 carriage, 2 wheels,			5 00
					$219 40
Year 1821,	Edward Livingston or others,	1st Dist. Bature F. B. St.Marie	8,000	53	17 60
	"	"	30,000	53	66 00
	"	"	40,000	53	88 00
	"	"	16,000	53	35 20
	"	"	5,000	54	11 00
	"	2d District, Square 26,	4slaves	64	4 72
	"	1 gig,			5 00
					$227 52
Year 1822,	Edward Livingston,	1st Dist. F. B. St.Marie,Sqr. 1,	6,000	43	10 80
	"	" Bature,	8,000	50	14 40
	"	"	5,000	51	9 00
	"	"	20,000	51	36 00
	"	"	6,000	52	10 80
					$81 00
Year 1823,	Edward Livingston,	1st District, Square 43,	4slaves	16	4 00
	"	" Bature,	12,000	50	21 60
	"	"	5,000	51	9 00
	"	"	6,000	51	10 80
	"	3d Dist. F. B. La course,	400	110	72
					$46 12
Year 1824,	Edward Livingston,	1st District, Bature,	5,000	55	9 50
	"	"	9,000	55	17 10
	"	"	6,000	56	11 40
	"	"	4,000	56	7 60
					$45 60
Year 1825,	Edward Livingston,	1st District, Bature,	5,000	57	9 00
	"	"	12,000	57	21 60
	"	"	5,000	58	9 00
	"	3d District F. B. Relegieuses,	500	125	90
					$40 50

Years of Taxes.	Names.	Situation.	Value.	Folio.	Taxes.
Year 1826,	Edward Livingston,	1st District, Bature,	5,000	58	$9 00
	"	"	1,500	58	2 70
	"	"	12,000	58	21 60
	"	"	5,000	60	9 00
	"	3d District F. B. Religieuses,	500	128	90
					$43 20
Year 1827,	Edward Livingston,	3d District F. B. Religieuses,	500	134	85
Year 1828,	Edward Livingston,	3d District F. B. Superieures,	400	139	64
Year 1819,	Heirs of Labigarre or others,	Levee F. B. St. Mary,	10,000	42	19 30
Year 1820,	Heirs of Labigarre or others,	Bature F. B. St. Mary,	10,000	48	20 80
Year 1821,	Heirs of Labigarre or others,	1st Dist. Bature F. B. St. Mary	10,000	54	22 00
Year 1822,	Heirs of Labigarre or others,	1st District Bature,	12,000	52	21 60
Year 1823,	Mad. M. L. Stewart and A. L. Delabigarre,	1st District Bature,	10,000	52	18 00
Year 1824,	Mad. M. L. Stewart,	1st District Bature,	4,000	56	7 60
Year 1824,	Mad. A. L. Delabigarre,	1st District Bature,	4,000	56	7 60
Year 1825,	Mad. M. L. Stewart,	1st District Bature,	4,000	58	7 20
Year 1826,	Mad. M. L. Stewart,	1st District Bature,	4,000	59	7 20
Year 1827,	Mad. M. L. Stewart,	1st District Bature,	4,000	63	6 80
Year 1828,	Mad. M. L. Stewart,	1st District Bature,	4,000	65	6 40
Year 1829,	Mad. M. L. Stewart,	1st District Bature,	4,000	67	6 40
Year 1830,	Mrs. Stewart,	1st District Bature,	4,000	53	6 00

(Signed) F. GARDIRE.

This is the document A. referred to by F. Gardire in his deposition.

(Signed) EDWARD RAWLE, *Acting Commr.*

Endorsed—Filed June 7th, 1839.

(Signed) D. N. HENNEN, *Clerk.*

By L. C. HORNSBY, *Dy. Clerk.*

Testimony of Witnesses.

Nicholas Girod states that he has resided near fifty years in New Orleans, and was at one period Mayor of the city; in 1806, the batture was in possession of the city; in the year 1807, lots of sixty feet by one hundred and twenty feet was not worth one hundred dollars. Lots were not saleable on the batture in 1807. Girod is aged 86 years.

Ramon Pamar states that he has resided in New Orleans since 1797; that the batture was small in 1807, and covered with water in the winter, and not improved at all. He does not think a lot on the batture at that period worth more than a thousand dollars, 60 by 120 feet. Lots in the city were of very little value then; that he had no idea of the rise of the city, like that which has taken place.

Gilbert Morris states that he has resided in New Orleans since 1800. That in 1807, the batture was in winter covered with water and not susceptible of private use.

It is admitted that James Brown was a man of wealth at his death, and from this period of 1807.

Endorsed—Filed 7th June, 1839.

(Signed) D. N. HENNEN, *Clerk.*

By L. C. HORNSBY, *Dy. Clerk.*

Preston's account as Executor of Brown's Estate.

To the honorable Probate Court of the Parish and city of New Orleans.

The petition of Isaac T. Preston, Testamentary Executor of the will of the late James Brown, respectfully shows:

That your petitioner has fairly administered the estate of the deceased, and herewith renders the account of his administration, which he prays may be approved and homologated.

Your petitioner further shows that he has instituted two important suits, for the benefit of the estate, and that a suit has been instituted against him for a large claim, by Richard R. Keene, Esq., which he thinks unfounded, and that for the settlement of these suits it is necessary that he should be continued executor for one year.

Wherefore your petitioner respectfully prays that he may be continued executor a year, and that his letters of executorship may be renewed on his complying with the requisites of law.

And that your honor would do and order whatever else may be useful and necessary in the case. As in duty bound, &c.

(Signed) ISAAC T. PRESTON.

The Estate of James Brown in account with Isaac T. Preston, his Executor. *Dr.*

1835.	To my legacy by the will of the deceased,	$1,000 00
1836.		
April 11.	To cash paid Wm. Boswell, notary, costs of inventory,	25 00
24.	To cash paid C. S. Duplessis and Philip Morris, appraisers,	8 00
	To cash paid State, Parish, and city taxes,	8 00
October 4.	To cash paid Judge Labranche for copy of Mr. Brown's will,	3 00
	To cash paid for half expenses of a journey to Ouachita, in relation to his Ouachita lands,	50 00
1837.		
March.	To cash paid Wm. Christy, Esq., for copy of Mr. Brown's letter to Lafont Cenas, as to Keene's claim,	4 00
	To cash paid for postage up to this date,	6 00
	To cash paid Wm. Christy, for copy of act of sale from Mr. Brown to John B. Humphreys	5 00
June 25.	To cash paid Edward Rawle for executing a commission in the suit of R. R. Keene *vs.* James Brown's estate,	100 00
July 8.	To cash paid C. Roselius, attorney of the absent heirs, fees allowed by the Court of Probates,	200 00

August 4.	To cash paid Solomon W. Downsand, attorney's fees and expenses of suit against Mr. Garrett for lands in Ouachita - - - -		$500 00
Nov'r 14.	To cash paid for city taxes, per receipt - -		10 00
1838.			
March 28.	To cash paid for repairing bankets, per receipt -		5 00
May 25.	To cash paid Mr. Chinn for professional services in the suit of R. R. Keene *vs.* Preston, Executor of James Brown, in part of fees - -		250 00
	To postage on express letters for documents to defend said suit, and sundry postages to this date - - - - - -		4 00
	To my commissions as Executor on -	$2,614 93	65 37
	And on the estimated value of a house and lot in the inventory - -	6,000 00	
	And on 30 shares of stock of the Bank of Louisiana, estimated at -	3,840 00	
		$12,454 97	311 37

1835.		Cr.
	By amount of Samuel C. Bill's note - -	$894 97
1836.		
Jan'y 1.	By rents from August 1, 1835, to this date, 5 mos., $35 per mo. - - - - -	175 00
1837.		
Jan'y 1.	By rents from January 1, 1836, to this date, 12 mos., $35 per month - - - - -	420 00
April 1.	By rents from January 1, to this date, 3 mos., $35 per mo. - - - - - -	105 00
	By four dividends on bank stock, at $120 each -	480 00
June 1.	By rents from April 1, to this date, 2 mos. at $35 per mo. - - - - -	70 00
Aug. 1.	By rents from June 1, to this date, 2 mos., at $35 per mo. - - - - -	70 00
Nov'r 1.	By rents from August 1, to this date, 3 mos., at $35 per mo., collected for me by Mr. Layton -	105 00
Dec'r 1.	By rent for month of November - - -	35 00
1838.		
Jan'y 1.	By rent for month of December - - -	35 00
Feb'y 1.	By rent for month of January - - -	35 00
March 1.	By rent for month of February - - -	35 00
April 1.	By rent for month of March - - -	35 00
May 1.	By rent for month of April - - -	35 00
June 1.	By rent for month of May - - - -	35 00
Dividend on bank stock	- - - - -	150 00

The house, and lot, and bank stock, mentioned on the other side remains on hand.

The deceased also had a claim to lands in Ouachita and Arkansas, which the executor has sued for.

He has also a disputed claim against the widow and heirs of the late John B. Humphreys, which the executor has put in suit.

He had funds to a large amount in the hands of James Irwin and of Charles Ingersel, which funds being out of the State of Louisiana, the executor did not take charge of, his avocations rendering it impossible, and the heirs not wishing it.

Order.

Let public notice be given to the creditors of the succession of the deceased James Brown, and to all other persons herein interested, to shew cause within ten days from notification why the account filed by the testamentary executor should not be homologated and approved, and the funds distributed in accordance therewith.

(Signed) J. BERMUDEZ, *Judge.*

NEW ORLEANS, 2d June, 1838.

In the matter of the succession of James Brown, deceased. In the Court of Probates in and for the Parish and city of New Orleans.

MONDAY, 18th June, 1838.

On motion of Isaac T. Preston, Esq., testamentary executor, on showing to the court that his account as executor had been advertized more than ten days, it is ordered that the same be approved and homologated so far as not opposed; and for the reasons exposed in the petition of the executor, it is ordered that he be continued executor for one year, and that letters of executorship be delivered to him on his giving bond, in the sum of thirteen thousand dollars, ($13,000,) with Robert Layton as his security, conditioned as the law directs.

(Signed) J. BERMUDEZ, *Judge.* [SEAL.]

NEW ORLEANS, 23d June, 1838.

A true copy:

(Signed) AND. D. DORWESURT,
D. R. of Wills.

Endorsed—Filed June 7th, 1839.

(Signed) D. N. HENNEN, *Clerk,*
By L. C. HORNSBY, *Deputy Clerk.*

This constituted the whole of the evidence in the cause, and upon which the judgment of the court was rendered, and this will be entered upon record as the full statement of the facts of the case.

(Signed) CHINN, *for defendant.*
(Signed) R. R. KEENE.

And afterwards on the eighth day of June, eighteen hundred and thirty-nine, the following brief was filed in the clerk's office, to wit:

KEENE
vs.
BROWN.

The plantiff sues for property, or the value thereof, conveyed to him by James and Samuel Brown. He produces no conveyance, but relies on the consideration of a conveyance from him to the Browns. The consideration is thus expressed: "For and in consideration of a certain lot or parcel of land, consisting of sixty feet front and one hundred and twenty feet deep, situated on the batture, *lately adjudged to John Gravier by the superior court holden in said city.*"

It is not expressed that the Browns are in possession or are to deliver possession to Keene; on the contrary, the terms of the consideration shew that Gravier is in possession and had the title by judgment.

It is evident, therefore, that the Browns merely transferred to Keene an incorporeal right to a lot to be reduced into possession by Keene himself, and what the title was as well as the description of the lot must be established by testimony, Code 1952,-'3,-'4, 1958, 1959, 1960. The correspondence proves fully that Brown was merely to *substitute Keene to himself as to that right;* he did so by his letter to Cenas & Lafon. This obligation he complied with by signing the act on which Keene sues, for by signing it Brown divested himself of the right. He could not afterwards sue the proprietors of the batture for the possession of the lot. It would have been answered to him, you have sold your right to Keene. Keene could sue them for the possession of the lot, because the right to it was transferred to him by the act annexed to his petition. Brown further transferred his right to Keene in Paris, by an order on Livingston, which he acknowledges in answer to it, to be satisfactory. Brown had, therefore, nothing to do with reducing the incorporeal right to the lot into possession. He complied with his whole obligation by signing the deed, by delivering the order. For the delivery of incorporeal rights takes place by delivering the title. Old Code, page 350, article 31—do. 368, article 121.

It is true Brown warrants the existence of the right; and that he had *a right* to a lot, of the dimensions claimed, on the batture is conclusively proved by the partition between Livingston and the trustees of Delabigarre's heirs, made but seven days before the exchange with Keene. It was this right which Keene acquired, and nothing more. That it could have been enforced at the time, there is not a doubt. It was to be given to Brown for services in a suit then finished, as the words from the deed sued upon, which I have quoted, clearly show. No writing or other testimony shows that Brown was to render services in other suits.

By whose neglect has the right been lost; for that it could have been enforced but for neglect, is proved by the fact that the proprietors of the batture to whom Brown rendered the services had lots on the batture

until a period subsequent to the correspondence in Paris. It has been lost, not by Brown's neglect; for having sold his right, he could not enforce it by suit. It has been lost by Mr. Keene's neglect, because having purchased the right to the lot, he left the country, and for twenty-five years has not brought suit to reduce the lot into possession. Indeed he does not appear to have made any demand of Livingston until very lately; he must therefore suffer the loss. The seller is not bound to warranty where the thing is lost by the fault of the buyer in not obtaining delivery. 2 Moreau and Carleton's Partidas, 685, Civil Code, article 2444.

The principles of law relative to novation, on which the plaintiff relies, are not applicable to the case. The defendant owed no debt to the plaintiff to be novated.

As the plaintiff sues for the consideration of a conveyance from him to the Browns, that is presumed to have been received, unless sued for within two years. Berthole *vs.* Mace, 5 Mart. Rep. 593—Moreau and Carleton's translation of the Partidas, 2 vol. 619, 620.

All personal actions on contracts to be prescribed by ten years.

Goddard's heirs *vs.* Thomas Urquhart.

A suit for the lot itself would have been prescribed by ten, and certainly by twenty years.

All suits prescribed by thirty years.

Damages only on default. New Code, 1905–8, 1926–7.

On the warranty, 2492–3–4, 2476, 2477, 2478.

Endorsed—Filed June 8, 1839.

(Signed) D. N. HENNEN, *Clerk*,
by L. C. HORNSBY, *Deputy Clerk.*

Clerk's Office.

CIRCUIT COURT OF THE UNITED STATES,
Ninth Judicial Circuit and Eastern District of Louisiana.

I, Allen Pierse, deputy clerk of the said court, do hereby certify that the foregoing fifty-eight pages and a half contain a full and complete transcript of the record of the pleadings, process, evidence, proceedings and other matters relating to the suit of Richard Raynal Keene *vs.* Isaac T. Preston, executor of James Brown, in this court; so fully as the same appears from the record of the court in my office.

Witness my hand and the seal of the court at the city of New Orleans, this fifth day of August, in the year of our Lord one thousand [SEAL.] eight hundred and thirty-nine, and of the independence of the United States the sixty-fourth.

[The name of the clerk erased and that of the deputy interlined.]
A. PIERSE, *Deputy Clerk.*
For D. N. HENNEN, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Judges of the Circuit Court of the United States, ninth Judicial Circuit and Eastern District of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea, which is in the said circuit court, before you, or some of you, between Richard Raynal Keene, plaintiff, and Isaac T. Preston, executor of the estate of James Brown, defendant, a manifest error hath happened to the great damage of the said Isaac T. Preston, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the second Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to law and customs of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-third.

[SEAL.]

DUNCAN N. HENNEN, *Clerk.*

THE UNITED STATES OF AMERICA,

To Richard Raynal Keene, Esq., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of January next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the ninth judicial circuit and eastern district of Louisiana, wherein Isaac T. Preston is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this seventeenth day of July, in the year of our Lord one thousand eight hundred and thirty-nine.

[SEAL.]

P. K. LAWRENCE, *U. S. Judge.*

Marshal's Return.

Received 25th July, 1839. Served same day by handing the within named R. R. Keene a certified copy of the within citation in person at the city of New Orleans.

L. C. BACON, U. S. Dep. Marshal

508.

SUPREME COURT OF THE UNITED STATES.

No. 47.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

CORNELIUS A. OGDEN.

IN ERROR TO THE DISTRICT COURT U. S. FOR THE SOUTHERN DISTRICT OF ALABAMA.

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Langtree & O'Sullivan, Print.

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SUPREME COURT OF THE UNITED STATES.

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Langtree & O'Sullivan, Print.

UNITED STATES OF AMERICA:

District Court of the United States for the Southern District of Alabama—May Term, A. D. 1839.

The President of the United States to the Judge of the District Court of the United States for the Southern District of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of judgment, of a plea which is in said district court before you, between the United States of America, plaintiffs, and Cornelius A. Ogden, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, and we being willing that the error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf—do command you, if judgment be therein rendered, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, according to law and the custom of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of [SEAL.] said district court, this second Monday of January, in the year of our Lord one thousand eight hundred and thirty-nine.

Issued the ninth day of May, in the year of our Lord one thousand eight hundred and thirty-nine.

Attest: DAVID FILES,
Clerk Southern Dist. Ala.

UNITED STATES OF AMERICA:

To Cornelius A. Ogden, and Gordon, Campbell and Chandler, your attorneys:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of January next, pursuant to a writ of error, filed in the clerk's office of the district court of the United States for the southern district of Alabama, wherein the United States of America are plaintiffs, and Cornelius A. Ogden is defendant in error, to shew cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and full and speedy justice should not be done to the parties in that behalf.

Witness the Hon. William Crawford, judge of the district court of the United States for the southern district of Alabama, this ninth day of May, in the year of our Lord one thousand eight hundred and thirty-nine.

We acknowledge service of this citation, 1st December, 1839, waiving exceptions to the citation.

GORDON, CAMPBELL & CHANDLER.

Pleas had before the Hon. the District Court of the United States for the Southern District of Alabama, at a term thereof begun and held in and for said District, at Mobile, on the first Monday of May, in the year of our Lord one thousand eight hundred and thirty-nine, before his Honor William Crawford, Judge of said Court:

Be it remembered, that heretofore, to wit, on the twenty-first day of March, in the year of our Lord one thousand eight hundred and thirty-nine, the United States of America sued out of the circuit court of the United States for the ninth judicial circuit and southern district of Alabama the writ of capias ad respondendum, against Cornelius A. Ogden, in the words and figures following, to wit:

THE UNITED STATES } 2,263.
vs.
CORNELIUS A. OGDEN. }

UNITED STATES OF AMERICA:
Circuit Court of the United States for the Ninth Judicial Circuit Southern District of Alabama.

The President of the United States to the Marshal of said District, greeting:

You are hereby commanded to take the body of Cornelius A. Ogden, and him safely keep, so that you have him before the hon. the circuit court aforesaid, at the place of holding said court, at Mobile, on the second Monday of April next, to answer unto the United States of America, in a plea of trespass on the case, upon promises to plaintiff, damage of three thousand dollars. Herein fail not, and have you then and there this writ.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this second Monday of October, in the year of our Lord one thousand eight hundred and thirty-nine.

Issued the twenty-first day of March, in the year of our Lord one thousand eight hundred and thirty-nine.

Attest: DAVID FILES,
Clerk Southern Dist. Ala.

This action is founded on a treasury transcript and settlement of the accounts of the defendant. The sum found due from defendant to the plaintiffs is $1,658 32.

GEO. W. GAYLE, *U. S. Attorney.*

Not found. R. S. CRAWFORD, *U. S. Marshal.*
By C. CUYLER, *D. M.*

And afterwards, to wit, at a term of the circuit court of the United States for the ninth judicial circuit and southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and thirty-nine, the plaintiffs filed the following declaration, to wit:

Declaration.

CIRCUIT COURT OF THE UNITED STATES,
in and for the 9th Judicial Circuit of the United States of America, Southern District of Alabama, April Term, 1839.

The United States of America, plaintiff in this suit, by Geo. W. Gayle, the attorney of the said United States, complain of Cornelius A. Ogden, in custody, &c., of a plea of trespass on the case, &c., for that whereas heretofore, to wit, at ———, on the first day of March, 1839, the said defendant became indebted to the plaintiff in the sum of sixteen hundred and fifty-eight dollars, 32 cents, lawful money, for so much money, had and received to said plaintiff's use, as appears by a settlement and adjustment of said defendant's account, made at the treasury department, on the first day of March, 1839. And whereas, also, on the day and year aforesaid, the said defendant was indebted to the said plaintiffs, in other sum of sixteen hundred and fifty-eight dollars, 32 cents, for so much money found due and owing the plaintiffs by said defendant, as appears by a transcript from the books and proceedings of the department aforesaid, made on the seventh day of March, 1839: by means whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said several sums of money above demanded; and being so liable, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, undertook and faithfully promised the said plaintiffs to pay them the said several sums of money above demanded, whenever he, the said defendant, should be thereunto afterwards requested. Yet the said defendant, although often requested, has not yet paid to the said plaintiff the said sums of money above demanded, or any part thereof, but to pay the same, or any part thereof, has hitherto wholly neglected and refused, and still does neglect and refuse so to do, to the damage of the said plaintiff of three

thousand dollars. And therefore the said attorney, in behalf of the said United States, brings suit, &c.

G. W. GAYLE,
District Attorney United States.

Whereupon, afterwards, to wit, at the same term of the said court, the defendant filed his plea, in the words and figures following, to wit:

Plea.

"Non Assumpsit."

GORDON, CAMPBELL & CHANDLER,
Attos. for defendant.

Issue on amended plea.

GAYLE, *U. S. Atty.*

And afterwards, to wit, at a term of the circuit court of the United States for the ninth judicial circuit and southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and thirty-nine, before his honor William Crawford, judge of the said court, the following proceedings were had, to wit:

Order.

By consent of parties, it is ordered by the court that the cause be transferred to the district court of the United States for the southern district of Alabama.

And afterwards, to wit, at a term of the district court of the United States for the southern district of Alabama, begun and held in and for said district, at Mobile, on the first Monday of May, in the year of our Lord one thousand eight hundred and thirty-nine, before his honor William Crawford, judge of the said court, the following proceedings were had, to wit:

Verdict.

This day came the parties, by their attorneys; whereupon, also, came the following jury, to wit: William Burns, J. Kennedy, J. Scott, J. Fisher, W. W. Gay, Mr. Treat, Wm. J. Tarriss, A. C. Hollinger, B. A. Mam, S. Warren, G. Smith, J. Y. Russell, twelve good and lawful men, who, being elected, tried and sworn, upon their oaths do say, that we, the jury, find for the defendant. It is therefore considered by the court that the said United States of America, plaintiff, take nothing by their said writ, and that the said Cornelius A. Ogden, defendant, go hence without a day.

Whereupon, at the same term of said district court, the plaintiffs filed their bill of exceptions, in the words and figures following, to wit:

Exception.

DISTRICT COURT OF THE UNITED STATES,
in and for the Southern District of Alabama, May Term, 1839.

Be it remembered, that at the trial of this cause, the plaintiffs offered in evidence a treasury transcript, regularly certified, exhibiting an indebtedness of the defendant to the plaintiffs, to the amount of sixteen hundred and fifty-eight dollars, 32 cents; and the defendant offered in evidence, under the plea of non assumpsit, the following items mentioned in said transcript, as disallowed or inadmissible in the settlement of said defendant's account, at the treasury department of the United States, and also proved the performance of the services mentioned in said rejected items of the said account, viz:

No. 7. Ac. of Lt. C. A. Ogden for per diem, for extra services, for surveying Mobile Harbour, between 1st September and 17th November, 1826, inadmissible. Lt. Ogden was in the receipt of $2 per day during the same time, as superintendent of fortifications at Mobile Point: $111 00.

No. 2. Lt. C. A. Ogden, for commission of 2½ per ct. for disbursing, on this account not admissible, he having charged and received a credit for the per diem, for disbursing during *during* the same, on ac. of Mobile Point, being the full amount authorized by the regulations for disbursing, &c.: $352 87.

No. 13. Lt. C. A. Ogden, for commissions of 2½ per cent. for disbursing on this ac't, not allowed, for same reasons: $724 92.

It being in proof that, at the time the services mentioned in said items were rendered, the defendant was in the receipt of a per diem of $2, as superintendent of fortifications at Mobile Point.

Whereupon, the plaintiff's attorney requested the court to charge the jury the 3 foregoing items were inadmissible as evidence; which charge the court refused to give, and to which the said plaintiffs except, and pray that this their bill of exceptions may be signed, sealed and enrolled, which is accordingly done.

WM. CRAWFORD, *Judge.*

I, David Files, clerk of the district court of the United States for the southern district of Alabama, do hereby certify that the above and beforegoing two pages contain a full, true and perfect exemplification of the record and proceedings in a certain suit lately depending and determined before said court, wherein the United States of America were plaintiffs, and Cornelius A. Ogden was defendant.

In testimony whereof, at office, in the city of Mobile, I have hereunto set my hand, and affixed the seal of said district [SEAL.] court, this ninth day of May, in the year of our Lord one thousand eight hundred and thirty-nine.

DAVID FILES, *Cl'k So. Dist. Ala.*

SUPREME COURT OF THE U. STATES.

No. 48.

GEORGE WILDES & CO., PLAINTIFFS,

vs.

THEODORE D. PARKER, ET AL.

UNITED STATES OF AMERICA,
District of Massachusetts.

Circuit Court in vacation, before May term, A. D. 1839.

To the honorable the judges of the circuit court of the United States, within and for the district of Massachusetts, sitting in equity:

Humbly complaining, show unto your honors, your orators George Wildes, Thomas Searle, John Pickersgill, and William C. Pickersgill, all of London, in the kingdom of Great Britain, bankers, copartners, using the name of George Wildes & Company, and all aliens to each and every of the United States. of and against Theodore D. Parker, of Boston, in the State of Massachusetts, merchant, and a citizen of the same State, and William Dehon, of said Boston, counsellor, and a citizen of the same State, and assignee of the goods and estate of the said Theodore.

That your orators are now, and for many years have been engaged in the business of banking, and previous to the dates hereinafter mentioned, advanced large sums of money to the said Theodore at his request, keeping an open account with him, wherein he was charged with the sums paid by them on his account, and the necessary expenses incident thereto, and credited with the sums remitted to them by him or on his account, according to the usual and customary mercantile form.

That upon the 31st day of December, in the year one thousand eight hundred and thirty-three, (31st December, 1833,) the said Theodore was indebted to your orators in a balance of account, amounting to the sum of three thousand one hundred and twenty-three pounds six shillings and eleven pence, (£3,123 6 11,) of the sterling currency of Great Britain.

That in the year eighteen hundred and thirty-four, (1834,) your orators received from Messrs. D. Crocker & Co., merchants, in Charleston, in the State of South Carolina, and then the mercantile correspondents of the said Theodore, a bill of exchange drawn on

your orators by one B. Ireland for the sum of seven hundred and sixty-eight pounds one shilling five pence, (£768 1 5,) with directions from said Crocker & Co. to pass the same to the credit of the said Theodore, which said bill your orators aver was duly accepted by them, and the amount thereof passed to the credit of the said Theodore on the 26th day of March, in the year 1834, (26th March, 1834.) And your orators aver, that said Theodore required said Crocker & Co. to cause your orators so to dispose of said bill. And your orators further aver, that due notice of said credit was given to said Theodore by your orators both in sundry letters shortly after said transaction, written by them to him, and in sundry accounts current forwarded by them to him, wherein was particularly set forth the state of said Theodore's account with your orators, and all the divers items as well of debt as of credit which composed said account, and which letters and accounts current contained a clear statement that the debt due to your orators on account with said Theodore, was diminished by the amount of said remittance from said Crocker & Co.

And your orators aver, that after said remittance was made to them as aforesaid, they had sundry other transactions to a large amount with said Theodore; and that on the 31st day of December, in the year 1834, (31st December, 1834,) there was due to them from him, the sum of four thousand one hundred eleven pounds two shillings eight pence (£4,111 2 8) on a general account, which said sum was composed as follows, to wit: the sum of two thousand nine hundred thirty-one pounds twelve shillings eight pence, (£2,931 12 8,) the balance of account due on the 30th day of the preceding June, and the sum of one thousand one hundred seventy-nine pounds ten shillings (£1,179 10) a balance accruing, due between said 30th day of June and said 31st day of December.

And your orators aver, that having for a long time unsuccessfully invited said Theodore to pay said several sums and settle his accounts, on the 16th day of April, in the year 1835, (16th April, 1835,) they commenced two suits at law against said Theodore to recover said several balances, which said suits were entered at the following May term of the circuit court of the United States for the district of Massachusetts, and prosecuted to final judgment in the manner and with the results which your orators will proceed to set forth.

Your orators aver that in the suit commenced as aforesaid to recover the balance due to them on the aforesaid 30th day of June, to wit: the sum of two thousand nine hundred thirty-one pounds, twelve shilling eight pence, (£2,931 12 8,) they recovered a judgment against the said Theodore for the sum of fifteen thousand four hundred and seventy-nine dollars forty-three cents, ($15,479 43) damage, and twenty-nine dollars forty-six cents ($29 46) costs, which said sums were duly paid by said Theodore on execution against him.

But your orators aver, that the other suit commenced as aforesaid, against said Theodore to recover the balance due them on the aforesaid

31st day of December, was continued from term to term until the May term of the hon. circuit court in the year 1837, when a verdict was rendered in favor of said Theodore, and an execution issued against your orators for the costs of said suit, amounting to the sum of forty-nine dollars seventy-eight cents ($49 78) which were paid by your orators as will be hereinafter stated.

Your orators further give your honors to understand, that after said suits were commenced against said Theodore, the said Theodore commenced a cross action against your orators, wherein he sought to recover damages against your orators for certain causes of action set forth in his writ, which said cross action of said Theodore was entered at the May term of the hon. circuit court of said district, which was holden in the year 1836, and was finally heard and decided at the May term of said court 1837, when a verdict was rendered for said Theodore against your orators for the sum of nine hundred eighty-eight dollars twenty-one cents, ($988 21) damages, and seventy-four dollars fifty-seven cents ($74 57) costs of suit, which said several sums, together with the aforesaid sum of forty-nine dollars seventy-eight cents ($49 78) amounting in the whole, to the sum of eleven hundred and twelve dollars fifty-six cents, ($1112 56,) were afterwards paid by your orators to the aforesaid William Dehon, Esq., the assignee of the said Theodore.

For your orators give your honors to be informed, that after the judgments were rendered, and before the filing of this bill, the said Theodore failed in his business and became and still is utterly insolvent, and unable to pay more than a small per centage of the debts due to his creditors, and on a certain day, of which your orators were ignorant, assigned all his goods and estate to the aforesaid William Dehon, Esq., in trust, for the benefit of his creditors, and according to the assignment law of the State of Massachusetts, so that the same are entirely beyond the reach of any process at law which may be instituted by your orators against the said Theodore.

And your orators further give your honors to be informed that, during the period of the aforesaid transactions with said Theodore and Stanton Parker, junior, late of Rio Janeiro, in the kingdom of Brazil, a brother and correspondent of said Theodore, and now deceased, was likewise largely concerned in dealing with your orators; and on the 31st day of December, in the year 1834, (31st Dec. 1834,) said Stanton was indebted to your orators in the sum of eight hundred thirty pounds, five shillings, four pence, (£830 5 4,) being the balance of his account. And your orators having frequently requested said Stanton to pay them said sum, and thus to close his account, and having been as frequently put off by him, sometimes with one excuse and sometimes with another, on the 2d day of November, in the year 1836, (2d Nov., 1836,) they commenced a suit at law against said Stanton to recover of him the sum aforesaid; which said suit was entered at the following May term of the said circuit court, and being continued from term to term, a verdict was rendered for your orators at the May term of said court, in the

year eighteen hundred and thirty-eight, (1838,) for the sum of one thousand dollars, ($1,000,) subject to be reduced by the court on evidence proving the proper amount due. But your orators aver that after the said verdict was rendered, and before the filing of this bill, the said Stanton died utterly insolvent, and your orators being unwilling to trouble themselves farther to obtain a very small per centage of a very small demand against an insolvent estate, and considering that the cost of obtaining it would be more than its amount when obtained, have directed the said suit to be abandoned, and by an agreement entered into between the counsel of your orators and the counsel of said Stanton in said suit, it will be dismissed, neither party claiming costs; and your orators aver that said agreement will be carried into effect at the approaching May term of the hon. circuit court, and that they deem said agreement to be binding on them, and it will be regarded by them accordingly.

And your orators give your honors to understand, that in said suit against said Stanton, he defended himself on the ground that a large part, if not the whole of the balance which your orators claimed to recover of him had been already paid by his direction. That the aforesaid remittance of seven hundred sixty-eight pounds one shilling five pence (£768 1 5) belonged to him, said Stanton, and ought to have been passed by your orators to his credit in their account with him, notwithstanding the written directions of said Crocker & Co. that the same should be passed to the credit of said Theodore, and your orators compliance with said directions. And your orators aver, that on the trial of the said suit against said Stanton, his honor the presiding judge, ruled that the said sum did in fact, belong to the said Stanton; that it ought to have been placed to his credit in his account with your orators, and that the balance claimed by your orators in said suit had been in part satisfied and paid by the said remittance of said Crocker & Co.

And your orators aver, that it was true, and that it appeared in evidence on said trial, that the bill of exchange aforesaid, remitted to your orators by said Crocker & Co. was purchased with the proceeds of the sale of certain coffee shipped from said Boston by said Theodore, and consigned for sale to said Crocker & Co., and that said coffee was not the property of said Theodore, but belonged to said Stanton, nor had said Theodore any interest therein beyond his lien as agent or factor of said Stanton.

And your orators further aver, that said Theodore well knew that said coffee and the proceeds thereof, belonged to said Stanton when said bill was remitted, and that said Theodore at the time that said judgment was rendered against him in favor of your orators for said sum of fifteen thousand four hundred and seventy-nine dollars forty-three cents, ($15,479 43,) well knew that he had been wrongfully credited with the amount of said remittance of seven hundred sixty-eight pounds one shilling five pence, (£768 1 5,) and that the real balance due from him to your orators, and for which they ought to have recovered and would have recovered judgment, had not said remit-

tance been so credited to said Theodore, was greater that said sum for which your orators did in fact recover judgment as aforesaid, by the amount of said remittance.

And your orators aver, that at time the judgment was rendered, they verily believed that the said sum of seven hundred and sixty eight pounds, one shilling, five pence, (£768 1 5) did in fact belong to the said Theodore, and that he was rightfully and honestly credited therewith, and that they did not know, nor had they any reason to believe, or suspect that any other person than said Theodore, had any interest in, or right, or claim to it, or any part of it. That if said Theodore had informed your orators that said remittance belonged to said Stanton, they would have credited said Stanton with the amount thereof, and would have recovered a judgment against the said Theodore, for a sum increased by the amount of said remittance, or if in said other suit, against said Theodore, wherein as aforesaid he recovered judgment against your orators for costs, he had then informed your orators of the true state of facts, as in conscience and equity he was bound to do, and that said sum remitted by said Crocker & Co., did not belong to him, and that he ought not to have been credited therewith. Your orators would have recovered a judgment against said Theodore, in said suit for the amount of said remittance and then have been enabled to effect their execution on said judgment, against said Theodore against the execution recovered on the judgment recovered by said Theodore, in his said suit for damages, against your orators.

And your orators most distinctly aver that during the whole time of the pendency of said suits from the decree of the writs, upon him said Theodore, and until and at the period of the rendition of judgments therein, he, said Theodore, well knew that he was credited by your orators with the said sum of seven hundred sixty eighty pounds, one shilling, five pence, (£768 1 5) and that to said credit he had no right, claim or demand in law or in equity; but that on the contrary, the credit so given, was given under mistake, and by reason that your orators erroneously supposed and believed that he, said Theodore, was justly and truly entitled to said credit; and that the said Theodore, contriving and intending to impose upon your orators, and wrongfully to diminish the judgments aforesaid, wilfully, fraudulently and designedly concealed from your orators, all the facts and circumstances herein before set forth, relative to the property of the said Stanton, in the said sum so by your orators credited to said Theodore, and allowed the said credit, in said proceedings and judgments, to enure to his own benefit, against right and good faith.

And your orators further aver that the said credit of the sum of seven hundred and sixty eight pounds, one shilling, five pence, (£768 1 5) so given as aforesaid to said Theodore, was given by your orators under an entire mistake of the facts, as above truly explained, and that they were led into said mistake by the wrongful allegations, and the fraudulent concealment and suppression of the truth, by said Theodore, and were by such suppression and concealment of the truth, and

by the conduct of the said Theodore in the premises, misled and deceived.

And your orators further aver, that by reason of the said fraudulent suppression and concealment of the truth, that said remittance rightfully belonged to said Stanton, your orators have been compelled to pay the aforesaid sum of eleven hundred and twelve dollars and fifty-six cents, ($1112 56) with a further sum for costs of collection to said Theodore's assignee; and can only recover from said Theodore, by any process of law, a small dividend on the aforesaid balance of seven hundred and sixty-eight pounds, one shilling, five pence, (£768 1 5) due to them from him, when said sum of eleven hundred and twelve dollars fifty-six cents ($1112 56) was paid by them as aforesaid.

And your orators further give your honors to be informed, that the said Theodore sometimes alleges and pretends that he gave directions to your orators to transfer said credit, from his account, to the account of said Stanton, and that your orators refused so to do, and thereby said Theodore seeks to impute negligence and lacks to your orators, and a disregard of those directions which said Theodore had a legal right to give, and which your orators were bound to obey.

Whereas your orators charge the truth to be, that at the time said remittance was made by said Crocker & Co., your orators were directed to place it to the credit of said Theodore, which they did. That this was done with said Theodore's knowledge and assent, and by his express orders. That afterwards, said Theodore directed your orators to transfer said credit to said Stanton's account, but that said Theodore gave no sufficient reasons for such directions; nor did he inform your orators, nor did they in fact know that said sum belonged to said Stanton. But your orators finding on an inspection of their accounts with said Theodore, that he was largely indebted to them, and having full experience of his delay and tardiness in settling his accounts, and having for a long time vainly endeavoured to rouse him to a sense of justice, and of the necessity there was, both for his own reputation and the convenience of your orators, that his account with them should at least be diminished if not finally settled; conceived that said sum having once passed to his credit by his own orders, had passed beyond his control, and that he had no right either by the rules of law or the custom of merchants or the usage of trade, further to direct its disposition, and that your orators were justified in refusing to obey directions with which a compliance would have been merely a courtesy shown by them to said Theodore, and not a matter which he could claim of them as a right; your orators therefore charge, that although they did refuse to transfer said sum from said Theodore's account to the account of said Stanton, yet their refusal was based upon an entire ignorance of the fact that said sum rightfully belonged to said Stanton; and that they were not guilty of any lacks or negligence in refusing compliance with what they conceived to be an illegal, unjust and irreconcileable requisition.

All of which actings, doings and pretences, are contrary to equity and good concience, and tend to the manifest wrong and injury of

your orators in the premises. In tender consideration whereof, and forasmuch as your orators are entirely remediless in the premises, according to the strict rules of the common law, and are relievable only in a court of equity, where mattters of this nature are properly cognizable and relievable. To the end therefore, that the said Theodore and William, was upon their several respective corporal oaths, full, true, direct and perfect answers make to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated, and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief, and more especially that they may answer and set forth, whether:

1st. Previous to December 31st, 1833, the said George Wildes & Co. had advanced to said Theodore on letters of credit, any, and what sums of money?

2d. The balance due from said Theodore to said George Wildes & Co. was £3123 6 11 on the 31st December, 1833.

3d. Did said Theodore ship any and how much coffee in the month of October, 1833, or at any other time, to Messrs. Crocker & Co. in Charleston, S. C., and did he direct the same to be sold, and the proceeds remitted to said Geo. Wildes & Co.?

4th. Did said Crocker & Co., in the month of February, 1834, write to said Theodore, informing him that said coffee had been sold and the proceeds remitted to said Wildes & Co., in a bill on said Wildes & Co. for £768 1 5?

5th. Did said Theodore in said month of February, write to said Crocker & Co., in reply to said letter, any, and what information?

6th. Did said Wildes & Co. after said remittance, inform said Theodore by letter, that said snm of £768 1 5 was placed to said Theodore's credit in his account with them?

7th. Did said Theodore receive from said Wildes & Co. an account current signed by them, and dated June 30th, 1834, on the credit side of which was entered the sum of £768 1 5, the amount of said remittance? When was it so received, and did it show the true state of accounts between said Theodore and said Wildes & Co., and the real amount then due from said Theodore to said Wildes & Co.?

8th. Did said Theodore receive an account current, signed by said Wildes & Co., and dated December 31st, 1834? Was said sum of £768 1 5, credited to him in said account? And was the balance therein, due from him to said Wildes & Co. stated to be £4111 2 3?

9th. Were two suits at law commenced against said Theodore by said Wildes & Co. on 16th April, 1835, to recover the several balances due from him to said Wildes & Co.? And were the same entered in the circuit court of the United States, for the Massachusetts district, at the May term thereof, in 1835, and in said court prosecuted to judgment?

10th. Did said Wildes & Co. recover any, and what sum of money of said Theodore in either of said suits, and was the sum recovered

by them the amount due from said Theodore on the 30th June, 1834, as stated in the aforesaid account current of that date with interest thereon?

11th. Did said Theodore commence a suit at law against the said Wildes & Co. When was it commenced, and was any and what sum recovered by them of him?

12th. Was the amount so recovered paid by said Wildes & Co. to Wm. Dehon, Esqr., and what is the total amount which was paid by them to said Dehon as a final settlement of said Theodore's demands against said Wildes & Co. under judgments at law, and when was it so paid?

13th. Has said Theodore failed in his business, and has he assigned his property to said Dehon? What is the amount of said Theodore's debts, and what of his property? When was said assignment made? And is said Theodore insolvent?

14th. Did said coffee shipped and sold as aforesaid, belong to said Stanton, and not to said Theodore? And were the proceeds of said coffee invested by said Theodore's orders in a bill of exchange, and remitted to said Wildes & Co. on said Theodore's account, and was the said bill of exchange for £768 1 5?

And that said William Dehon, Esq., may be ordered truly to set forth and discover the sum now in his possession by virtue of the said assignment of said Theodore, and to refund to your orator the several sums paid to him by your orator under said judgments as assignee of said Theodore, and that your orators may have such farther and such other relief in the premises as the nature of the case shall require, and as to your honors shall seem meet.

May it please your honors to grant unto your orator not only your honors' writ of injunction issuing out of, and under the seal of this honorable court, to be directed to the said William Dehon, Esqr., to restrain him from paying out of the trust fund in his possession as assignee of said Theodore, so much money as will disable him, said William, from refunding to your orators the several sums by them heretofore as aforesaid, paid to him as said assignee, in case your honors' shall hereafter decree that said several sums ought in conscience and equity to be repaid to them, or to disable him from fully responding to and performing such decree as your honors shall hereafter make touching the premises.

But also your honors' writ of subpœna, to be directed both to said William Dehon, Esquire, and said Theodore D. Parker, commanding them to appear, when and where this honorable court shall order, to abide by and perform such decree in the premises as this court shall find it right and just to render.

GEORGE WILDER.
THOMAS DARLE.
JOHN PICKERSGILL.
WM. C. PICKERSGILL.
by I. J. NEWTON, *their Solicitor.*

A true copy.
Attest: FRANCIS BASSETT, *Clerk.*

516.

SUPREME COURT OF THE UNITED STATES.

No. 49.

JOSEPH SMITH, APPELLANT,

vs.

THE CHESAPEAKE AND OHIO CANAL COMPANY.

ON APPEAL FROM THE CIRCUIT COURT UNITED STATES FOR ALEXANDRIA.

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Langtree & O'Sullivan, Print.

DISTRICT OF COLUMBIA, *to wit:*

Pleas before the Hon. the Judges of the United States Circuit Court of the District of Columbia, for the county of Alexandria, at the court house, in the town of Alexandria, on the 11th November, 1839.

Title.

JOSEPH SMITH, Complainant,
against
THE CHESAPEAKE AND OHIO CANAL COMPANY, Defendants. } In Chancery.

Be it remembered, that heretofore, to wit, at the rules held in the clerk's office of the said court for the month of July, 1831, came the complainant, by Robert I. Taylor, Esq., his solicitor, and filed there a certain bill against the said defendants, which is in the words and figures following:

Bill.

To the honorable judges of the circuit court of the District of Columbia, sitting in chancery at Alexandria:

Humbly complaining, shows unto your honors, your orator, Joseph Smith, that in the month of October, in the year 1784, an act was passed by the General Assembly of the State of Virginia, entitled an act for opening and extending the navigation of the river Potomac; and in the month of November, in the same year, a similar act was passed by the General Assembly of the State of Maryland, and that many other acts in relation to the same subject, were subsequently passed by the Legislatures of the said States, of which a schedule is hereunto annexed; of all which, true copies are herewith exhibited and prayed to be taken as parts of this bill.

That the subscriptions by the two first mentioned acts required were duly made, and the subscribers were by the said acts duly incorporated and made a body politic, under the name and style of the "Potomac Company," add became and were entitled to all the rights, and privileges, and immunities in the said acts and the several subsequent acts designated and granted.

That the said company, in the exercise of the powers to them given proceeded to improve the navigation of the said river, as well by deepening the bed thereof and removing all obstructions, as by cutting canals and building locks, wherever the same were necessary; and that for many years previously to the surrender of their interests to the Chesapeake and Ohio Canal Company, hereinafter mentioned, the said Potomac Company had been and were in the receipt of large sums of money, annually, for

tolls on boats, merchandize, produce, lumber, and other property passing up and down the said river above tide-water.

Your orator further shows to your honors, that on the 27th January, 1824, an act was passed by the General Assembly of the State of Virginia, entitled "An act incorporating the Chesapeake and Ohio Canal Company," and that sundry acts in relation to the said company were passed by the Congress of the United States, and by the Legislatures of Virginia, Maryland, and Pennsylvania; of all of which acts, (whereof a schedule is hereto annexed,) copies are herewith exhibited as parts of this bill.

That the conditions prescribed by the said acts were all duly performed and complied with, and that a subscription of stock under said first-mentioned, to the amount of dollars was duly made, and that the subscribers became and were legally incorporated, and made a body politic, under the name and style of the "Chesapeake and Ohio Canal Company," and became and were entitled to all the rights, privileges, and immunities by the said act of the 27th Jan., 1824, and the various acts subsequent thereto, granted to the said company. That under the provisions of the second section of the said act of the 27th January, 1824, a large amount of the said subscription was made in the stock of the said Potomac Company, and in claims of creditors of that company. That on the 16th day of May, 1825, the said Chesapeake and Ohio Canal Company was organized; and the said Potomac Company did, in pursuance of the provisions of the said last-mentioned act, declare its assent hereto; and did on the 15th August, 1828, under the 13th section thereof, surrender its charter and convey in due form of law to the said Chesapeake and Ohio Canal Company all the property, rights, and privileges, by them owned, possessed, and enjoyed under the same; and the said Chesapeake and Ohio Canal Company did thereupon accept the said surrender and transfers, and thereafter held, possessed, used occupied and enjoyed, all the said property, rights, and privileges, in the same manner, and to the same effect, as the said Potomac Company theretofore held, possessed, and occupied the same; and the charter of the said Potomac Company thereby became vacated and annulled, and all the rights and powers vested in the said Potomac Company became thereby vested in the said Chesapeake and Ohio Canal Company.

That by the 12th section of the said act, it is provided that it should be the duty of the president and directors of the Chesapeake and Ohio Canal Company, so long as there should remain any creditor of the Potomac Company, who should not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company, to pay to such creditor or creditors annually such dividend or proportion of the nett amount of the revenues of the said Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors at the time of the passing of the said act might bear to the whole debt of one hundred and seventy-five thousand eight hundred dollars.

That the said Chesapeake and Ohio Canal Company, under the said deed of surrender, did proceed to receive the tolls which had heretofore been received by the said Potomac Company, and have ever since con

tinued to receive the same, and that the annual revenues of the said Potomac Company for the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, amounted to very large sums of money, but the precise amount your orator has been unable to ascertain. That at April term, in the year 1820, by the judgment of your honorable court on the common law side thereof, the State of Maryland, at the relation, and for the use of your orator, recovered against the said Potomac Company the sum of twelve thousand seven hundred and fifty dollars, with interest from 20th June, 1818, till paid, and twenty-one dollars $\frac{61}{100}$ costs, as by the record of proceedings in the said suit will more fully appear, a copy whereof is herewith exhibited as a part of this bill; that the said judgment still remains in full force, in no ways reversed or annulled.

[For the record State of Maryland, use, &c. vs. the Potomac Co., see page 44.]

That the claim on which the said judgment was rendered was assigned to your orator for value received by one Samuel Harper, and that before your orator made the purchase of it, he enquired of the president and many of the directors of the said Potomac company, whether the said claim was a fair and valid claim, and would be paid; to which enquiries he was by them answered in the affirmative, and under the assurance so given he was induced to make the said purchase and receive the said assignment.

Your orator further shews to your honors, that on the 6th day of December, 1824, he assigned to one George Suckley, for a full and valuable consideration, the sum of $4000, part of the said judgment, with interest thereon, from the 24th December, 1823, till paid. That on the 24th December, 1827, he presented a copy of the said judgment to the Secretary of the said Potomac company, to be certified to the said Chesapeake and Ohio canal company, and was informed by the said Secretary that a copy of the said judgment had already been filed and entered on the proceedings of the said company, with an assignment of part thereof as aforesaid to the said George Suckley.

That on the 11th day of August, 1828, he made a written tender of the said judgment to the treasurer of the said Potomac company, with a request, in writing, that it should be certified to the said Chesapeake and Ohio canal company, under the provisions of their charter, and that if such certificate should be refused, his application and the refusal of the certificate should be entered on the minutes of the Potomac company. That the certificate so applied for was refused to your orator, on what ground he is not fully informed, and he does not know what proceedings were had by the board of directors of the said company on his said application. That he has been informed and believes that the said George Suckley was permitted to subscribe his interest in the said judgment under his assignment from your orator, to the stock of the said Chesapeake and Ohio canal company. That your orator had made frequent applications to the board of directors of the said Chesapeake and Ohio canal company, for his dividend on that part of the said judgment remaining unassigned, and for which he has received no payment or satisfaction, according to the provisions of the 12th section of the said act of the 27th January, 1824, and that the said board have not only refused to pay him any dividend, but deny all liability for it. On what grounds they place their exemption from

your orator's claim, he is not informed. That your orator knows not, nor has he the means of ascertaining the amount of dividend to which he is entitled, without access to the books and papers of the said Potomac company, now in the hands of the board of directors of the said Chesapeake and Ohio canal company, and without an account to be taken for the purpose of ascertaining the average revenues of the said Potomac company for the last five years preceding the organization of the said Chesapeake and Ohio canal company.

That the means and materials necessary for taking such account are not in the power of your orator, but are wholly within the power and control of the said Chesapeake and Ohio canal company, who refuse your orator access thereto, and withhold the aid and information necessary for him, to enable him to proceed.

All which actings and doings of the said Chesapeake and Ohio canal company are contrary to equity and conscience, and tend to the manifest wrong and oppression of your orator. In tender consideration whereof, and inasmuch as your orator has no adequate remedy in the premises at common law, and can only obtain effectual relief in your honorable court, and to the end that the said Chesapeake and Ohio canal company may be made defendants hereto, and may be compelled to make full and true answer to the premises as if each particular charge herein before contained were specially repeated and interrogated, and more especially, that they may set forth and declare whether the laws contained in the two schedules hereto annexed, in relation to the said Potomac company, and the said Chesapeake and Ohio canal company were not enacted as before charged; were not the said companies legally incorporated, and at what time was the latter organized; did not the said Potomac company make a surrender of their charter, and assign and convey to the said Chesapeake and Ohio canal company all their rights, privileges and effects of every kind; and did they not deliver up all their property and effects to the said Chesapeake and Ohio canal company, and were not the said surrender, assignment, conveyance and delivery accepted and received by the said Chesapeake and Ohio canal company. What was the gross amount of tolls of the said Potomac company for the five years next preceding the organization of the said Chesapeake and Ohio canal company; what was the amount of expenses and disbursements for the same period, and for what were such expenses and disbursements incurred; what was the amount of claims against the said Potomac company, and what amount thereof was certified to the said Chesapeake and Ohio canal company; Was the said George Suckley allowed to subscribe his part of the judgment aforesaid, to the said Chesapeake and Ohio canal company; has such subscription been permitted to stand, and is he in virtue thereof still retained on the list of stockholders; did he at a general meeting of the stockholders of the said Chesapeake and Ohio canal company make application for leave to withdraw his said subscription, and was such leave refused to him.

And that your honors may direct an account to be taken for the purpose of ascertaining what dividend he is entitled to receive on his judgment aforesaid, and that the said Chesapeake and Ohio Canal Company may be decreed to pay the same to him. And that your honors may

make such further order and decree, in the premises, as may be most consistent with equity and conscience. May it please your honors to grant, to your orator, the United States writ of subpœna to the said defendants directed, &c.

R. J. TAYLOR,
Sol'r for Compl't.

Bill taken for, confessed, & set for decree.

And at the rules held at the clerk's office of the said court, for the month of September, 1833, came the complainant by his solicitor; and the defendants having failed to appear and answer the complainant's bill, on the motion of the complainant by his solicitor, his bill is now taken for, confessed, and set for decree.

And at another day, to wit: at a court continued and held for the district and county aforesaid, the fourteenth day of November, 1833, came the compl't by his solicitor, and the complainant's bill having been heretofore taken for, confessed, and set for decree, on his motion, and to enable the court to pronounce a final decree herein; it is by the court ordered that Master Comm'r Auld do take an account of all the debts which were due from the late Potomac Company, on the 15th day of August, 1828, when they surrendered their charter, and transferred their effects to the Chesapeake and Ohio Canal Company; and that he do ascertain the nett amount of the revenues of the said Potomac Company, on an average of the last five years preceding the organization of the Chesapeake and Ohio Canal Company; and, to enable the said commissioner to execute this order, the said Chesapeake and Ohio Canal Company, and their officers and agents, are required to submit to the inspection and examination of the said commissioner all the books, papers, and accounts of the late Potomac Company, within their possession, or within their power or control. And the said commissioner is directed to make report of his proceedings herein, to the next term of this court.

' Referred to Master Com'r Auld.

And at a court continued and held for said district and county, the tenth day of June, 1839, came the compl't by his solicitor, and Master Commissioner Auld filed his report, and this cause is continued; which report is as follows:

Commissioner Auld's report.—Statement of claims.

	Int. to 15th Aug. 1828.
Joseph Smith, judgment - - -	$12,750 00
Int. from 20th June, 1818, to 24th Dec., 1823, 5 yrs. 6 ms. 4 dys. - -	4,215 87
	$16,965 87
Assigned this date to George Suckley -	4,000 00
	$12,965 87
Interest on $8,750 from Dec. 24, 1823, to 15th Aug., 1828, 4 ys. 7 ms. 22 dys. -	2,436 10
Costs of suit - - - -	21 61
	$15,423 58

Int. on $8,750 from 15th Aug., 1828, till paid.		
Union Bank of Georgetown, note due 20, 23 Aug., 1818 - - - - -	$4,430 62	
Interest from 23d Aug., 1818, to 16th May, 1825, 6 yrs. 8 mo. 23 dys. -	1,788 94	
	$6,219 56	
Remaining unpaid of note due 16th May, 1825 - - - - -	2,916 97	
	$9,136 53	
Int. to 15th Aug., 1828, on $7,347 59, 3 yrs. 3 mo. less 1 day - - -	1,431 56	
		$10,568 09
Int. on $7,347 59, from 15th Aug., 1828, till paid.		
Central Bank of Georgetown and Washington, note dated 3d May, 1825, at 10 dys., due 16th May - - - - - -	$1,232 60	
1828, May 14th, int. 3 yrs., less 2 dys. -	221 45	
	$1,454 05	
1828, May 14th, payment then made, *i. e.* on the 14th May, 1828 - -	228 15	
	$1,225 90	
1828, Aug. 11, int. 89 days - -	17 92	
	$1,243 82	
1828, Aug. 11, payment then made -	67 66	
	$1,176 16	
1828, Aug. 11, int. 4 days - -	77	
		1,176 93
Int. on $1,176 16, from 15th Aug., 1828, till paid.		
Butts and Cawood - - - -	$547 40	
Int. from 1st to 15th Aug., 1828 -	1 25	
		548 65
Int. on $547 40, from 15th Aug. 1828, till paid.		
Amount of claim exhibited with interest till 15th Aug., 1828 - - -		$27,717 25

COMMISSIONER'S OFFICE, Alexandria, May 5, 1835.

JOSEPH SMITH, complainant,
vs.
THE CHESAPEAKE AND OHIO CANAL COMPANY, defendants.

Pursuant to the order of the honorable court, a copy of which is filed herewith, and after giving due notice in the public papers of the time of proceeding to execute it, as well as personal notice to the parties within this district, I am enabled to report on the subject matter embraced in said order, in a very unsatisfactory manner to myself, as follows: That the claim of the complainant, Joseph Smith, on the 15th Aug., 1828, amounted to the sum of fifteen thousand four hundred and twenty-three dollars fifty-eight cents, with interest on $8,750, part thereof, till paid; and that the other creditors of the Potomac Company have exhibited their claims, to wit: the Union Bank of Georgetown, which on the said 15th August, 1828, amounted to the sum of $10,568 09, with interest on $7,347 59 till paid.

The late Central Bank of Georgetown and Washington, which, at said date, amounted to $1176 93, with interest on $1176 16 till paid; and Mark Butts, surviving partner of Butts and Cawood, to the amount of $548 75; with interest on $547 40 from the said 15th August, 1828, till payment.

The claim of the said Joseph Smith is evidenced by judgment as in the proceedings mentioned. The claims of the Union Bank and Central Bank by notes; and that of the said Mark Butts, by the certificate of Jonah Thompson, agent of the Potomac Company.

That the defendants not appearing to the first notice, the notice herewith filed, marked A, was served, which met with a like fate. Of the time of closing this report, the parties had notice, and the complainant, Joseph Smith, attended.

A statement of the respective claims is annexed, amounting in the aggregate to $27,717 25, including interest to 15th August, 1828.

All which is respectfully reported.

COLIN AULD, M. C.

Answer filed, and gen'l rep.

Commissioner's fees, advertisements and notice, $19 50, ch'd plt'ff.

And at a court continued and held for the district and county aforesaid, the 2nd day of November, 1835, came the defendants by Thomson F. Mason, Esq., their solicitor, and filed their answer, to which the complainants reply generally, and this cause is returned to the rules for further proceedings, which answer is as follows:

Defendant's Answer.

The answer of the Chesapeake and Ohio Canal Company to the bill of complaint exhibited against them by Joseph Smith in the Circuit Court of the District of Columbia, and sitting for the county of Alexandria.

The defendants saving and reserving to themselves all benefit of exception to the errors and uncertainties of the complainant's bill, for answer unto so much thereof as they are advised that it is material for them to answer, say, that it is true "The Potomac Company was duly incorporated by certain Acts of the States of Virginia and Maryland, and that the said Company became entitled to all the rights, privileges, and immunities, in said acts designated and granted. It is also true that the Chesapeake and Ohio Canal Company was incorporated by certain acts of Congress and of the States of Virginia and Maryland, and became entitled to all the privileges and immunities granted to said Company by the several acts passed in relation to the same.

And that on the day of the said Chesapeake and Ohio Canal Company was duly organized; and that the Potomac Company did, according to the provisions of the act passed by the General Assembly of Virginia on the 27th January, 1824, in relation to said Canal Company, declare its assent thereto, and subsequently surrendered its charter, and conveyed all its property, rights, and privileges to the Chesapeake and Ohio Canal Company; and the said surrender and conveyance were accepted by the said Chesapeake and Ohio Canal Company.

It is true that the 12th section of the act referred to in the complainant's bill declares that it shall be the duty of the President and Directors of the Chesapeake and Ohio Canal Company, so long as there shall be and remain any creditor of the Potomac Company who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company, to pay to such creditor, or creditors, annually, such dividend or proportion of the nett amount of the revenues of the Potomac Company, on an average for the last five years preceding the organization of the Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors, at the time of the passing of the said act, might bear to the whole debt of $175,800; but by the 2d section of the same act, it is provided that the said certificates of claims against the said Potomac Company, and to be made by the President and Directors of the said Company, according to the directions of said act, should not exceed in the whole amount the sum of $175,800; and it is denied that in the estimate forming this aggregate of $175,800, the complainant's claim was taken into view, or formed any part thereof. The respondents further say that the amount of claims against the said Potomac Company, and which were certified to them by the President and Directors of said Company, according to the directions of the act aforesaid, was $175,325 76¾; in which neither the claim of the complainant, nor any other claim arising from the lotteries drawn or authorized by the Potomac Company, formed any part.

The respondents admit they deny all the liability for the complainant's claim. They are informed that the Potomac Company were authorized by an act of the Legislature of Maryland, passed in January, 1810, (a copy of which is hereto annexed, and prayed to be taken as a part of this answer) to raise a sum of money by lottery or lotteries for the purposes therein mentioned. That the said Company held or claimed no other power or authority whatever for making or disposing of lotteries or any tickets therein, than what is conferred on them by the said act of Maryland.

That the said Company, in fact, never did draw any lottery in the State of Maryland, or according to the provisions and authority of the act aforesaid. That they proceeded erroneously to arrange and dispose of a lottery in the District of Columbia, and which was afterwards drawn in said District, and out of which the claim of the complainant arises. That for the purpose of aiding the sales of their tickets, and providing in the speediest manner for the laudable objects in view, they proceeded to dispose of their tickets to various persons, and agreed to take from the purchasers their notes payable to the said Company thirty days after the drawing of the lottery should be completed. The lottery was disposed of and the drawing completed in good faith, no doubt having occurred or been expressed by any one as to the propriety of the proceeding. It having become necessary some time after to institute suit for the recovery of some of these notes, so given for the price of the tickets sold, the defence was set up, and by this honorable court it was judicially decided that the lottery was void, and that no suit could be maintained for the price of the tickets or for prizes. This decision effectually put a stop to all collections on account of the lottery. By the annexed letters, marked No. 1 and No. 2, and exhibited as part of this answer, it will be seen that the said Potomac Company had no means left of repairing the mistake which had been committed, their lottery privilege, under the law of Maryland, having been forfeited under subsequent acts of that State.

The respondents admit that a judgment was recovered against the Potomac company in 1820, as alleged, but they deny that the same was assigned to the complainant for value, or that before he made the purchase of it, that he enquired of the Potomac company or the president and directors thereof, or that he was informed by them that the said claim was a fair and valid claim and would be paid, or that he was induced by any such assurances from them to make the said purchase. On the contrary, your respondents allege, that the said judgment was given under an entire and manifest ignorance on all sides of the rights of the parties, and which were afterwards ascertained by a judicial decision of this court.

It is admitted that the complainant did, on the 11th August, 1828, present his claim against the Potomac company, to the treasurer thereof, and request that the said judgment might be certified to the Chesapeake and Ohio canal company according to the provisions of their charter; and that the certificate so applied for was refused. It is admitted that George Suckley was allowed by the commissioners, for receiving subscriptions to the stock of the company, to subscribe the amount of a debt claimed by him to the stock of the company, and which appears on the book of subscription in the following form—"1827, No. 6. George Suckley, New York, payable in debt of the Potomac company four thousand dollars, with interest from 24th November, 1823." But the nature of the claim, as the respondents are informed and believe, was neither understood nor investigated; nor is it believed the commissioners possessed any power to decide on the validity of any claims so offered for subscription. Some application, it is believed, was afterwards made either to the stockholders or to the board of directors on the subject, but the same was not investigated nor was any formal decision made in relation

to it, and no entry or memorandum appears to have been made in relation to it. It being deemed, as it is presumed, unnecessary to pass on such a claim, further than to prevent it assuming the shape of a debt against the company, when, from the charter, it was known to be postponed as to all benefit of dividends, beyond the active capital of the company, and all debts against it. The respondents deny that the nett annual revenues of the Potomac company, for the last five years preceding the organization of the Chesapeake and Ohio canal company amounted to large sums. On the contrary, they believe, that the nett amount of said revenues were very small, if, indeed, any thing be left after discharging the necessary expenses for the repairs of the works, then very imperfect and unfinished,

Referred to Master Com'r Eaches.

and for the necessary pay of the officers and servants, and other necessary incidental expenses.

The respondents, as the best statement immediately in their power to make, hereto annex a table of the gross revenues of the Potomac company for five years preceding the first of August, 1827, together with the disbursements during the same period for other than debt and interest, which was exhibited by the Potomac company, with their circular address, for the information of their creditors, previous to the surrender of their charter, and with the view of obtaining their assent to the terms provided in the charter of the Chesapeake and Ohio canal company, which is believed to make as favorable an exhibit of the revenues of said company as could be presented, and more favorable than a strict account would probably warrant. The respondents deny all fraud, combination, &c., and pray to be hence dismissed, with their reasonable costs, &c.

Table exhibiting the gross revenues of the Potomac Company, for five years preceding the 1st August, 1827, and the disbursements during the same period, other than for debt and interest.

Years ending 31st July.	Gross revenues.	Salaries to treasurer and collectors of toll, hire and other expenses of hands employed to tend the locks.	Repairs of locks, and canals, and channels, in the river.	Contingent expenses including per-diem allowance for directors' attendance, amounting to about $110 per ann. Office rent and charges, law charges, postages, &c.
1823	$6,238 85	$2,117 21½	$2,333 59½	$654 01¼
1824	9,851 13½	2,147 58	692 76¾	628 57
1825	9,843 34¾	2,174 23¾	48 20½	394 02¼
1826	11,505 33¼	2,126 30	2,595 95¾	775 30
1827	11,809 90	2,171 13¾	2,888 22	503 91
	$49,248 56½			

At another day, to wit: at the rules held in the clerk's office of the

said court for the month of October, 1836, (until which time
Cause set for hearing. this cause had been regularly continued,) came the parties aforesaid by their solicitors, and this cause is set for hearing on the bill, answer, exhibit, and report of master commissioner.

And at a court continued and held for said district and county, the 4th day of June, 1838, (until which time this cause had been regularly continued,) came the parties aforesaid by their solicitors, and this cause having been heard on the bill, answer, general replication, and the exhibits, and the affidivit of Samuel B. Harper, and the deeds of Joseph Smith to
Referred to Master Com'r Eaches. Samuel Harper, which are admitted as evidence in this cause by consent of the parties; and this cause is referred to Master Commissioner Eaches, to ascertain the nett amount of the revenues of the Potomac Company, on an average of the last five years next preceding the organization of the Chesapeake and Ohio Canal Company, and the proportion which the demand of the complainant on the 27th day of January, 1824, bore to the sum one hundred and seventy-five thousand eight hundred dollars, and to report the same to this court

At another day, to wit: at a court held for the district and county aforesaid, the first day of October, 1838, came the parties aforesaid by their solicitor and Master Commissioner Eaches, filed his report, and this cause is continued, which report is in the words and figures following:

Commissioner's Report.

COMMISSIONER'S OFFICE, Alexandria, Sept. 8, 1838.

JOSEPH SMITH
vs.
C. & O. CANAL CO. } In Chancery.

This case having been referred to me by an order of your honorable court, passed at May term, 1838, to "ascertain the nett amount of the revenues of the Potomac Company, on an average of the last five years next preceding the organization of the Chesapeake and Ohio Canal Company, and the proportion which the demand of the complainant, on the 27th January, 1824, bore to the sum of one hundred and seventy-five thousand eight hundred dollars, and report the same to the court." I informed Joseph Smith, verbally, on or about the 20th of June, that I was ready to commence the investigation, and at the same time gave similar notice to the Chesapeake and Ohio Canal Company, by directing a written communication to John P. Ingle its secretary, whose letter, marked A, accompanying this report is an acknowledgement of the notice. For the sake of greater convenience to all parties, and to lessen the expense, I called at the office of the Chesapeake and Ohio Canal Company, on or about the 2d day of July, and twice subsequently, and from the information obtained through John P. Ingle, secretary of the Chesapeake and Ohio Canal Company, and Robert Barnard, late secretary of the Potomac Company, and now clerk for the Chesapeake and Ohio Canal Company, I am enabled to place before the court evidence sufficient to determine what were "the nett revenues of the Potomac Company on an average of the

last five years next preceding the organization of the Chesapeake and Ohio Canal Company," but for want of sufficient testimony cannot satisfactorily comply with the remaining part of the order, not having clearly ascertained what is the amount of Joseph Smith's claim. Robert Barnard afforded me every facility in ascertaining the revenues of the Potomac Company. He prepared from the annual reports of the secretaries of that company a statement showing the nett amount of revenues from rents and tolls after deducting all expenses, of which the paper herewith submitted, as a part of this report marked B, is a copy, from which it appears that the nett revenues, leaving the interest on the company's debt out of the question, for the last five years immediately preceding the 1st of August, 1828, within a few days of the time of the organization of the Chesapeake and Ohio Canal Company, was twenty-nine thousand nine hundred and twenty dollars and twenty-nine cents, ($29,920 29.) Learning from the secretary of the C. & O. C. Cy., John P. Ingle, that the question would be raised whether or not in ascertaining the revenue of the Potomac Company, the interest on its debt should not be taken into consideration, I had prepared the statement, of which paper marked C, herewith submitted, is a copy, from which it will be seen at a glance that the nett proceeds of tolls and rents were not sufficient to pay the interest on the debt; the whole debt on the 1st of August, 1823, was $183,963 59½, and with the accumulation of interest over and above the nett receipts from rents and tolls, it would have been on the 1st of August, 1828, $200,849 38½, but that the company declined paying the creditors any interest on their claims after the 16th of May, 1825, the time at which the Potomac Company declared its assent to the act incorporating the Chesapeake and Ohio Canal Company. And in consequence the amount of claims against the Potomac Company on the 15th day of August, 1828, was only 175,325 76¾ dollars, exclusive of Joseph Smith's and some other claims of a similar nature, see paper marked D, being an abstract from the certified list of creditors. It is owing to two circumstances that the certified list of debts agrees so nearly in amount with the sum provided for in the charter; first, that when the act of January 27, 1824, was passed by the Virginia Legislature, instead of providing for the payment of the debts then actually due, a sum was inserted agreeing with the amount which had been due 1st August, 1822. Second, that the assent to the law was given by the Potomac Company on the 16th of May, 1825; and, consequently, no interest allowed on the debts from that time until the 15th of August, 1828, when the certified list was made

From the foregoing statements it is evident that if the amount of revenue for the five years preceding the organization of the C. & O. C. Co. is determined by deducting all expenses from the gross receipts of tolls and rents, it will be $29,920 29; if the interest on the company's debt had been paid and taken into the estimation, it would have been nothing, but by omitting to pay the interest from May 16th, 1825, to August 15th, 1828, the nett receipts for tolls and rents reduced the amount of the Potomac Company's debt from 183,963 59½ dollars to 175,325 76¾ dollars, say 8,637 82¾ dollars. After submitting these statements, I respectfully report: That the revenues of the Potomac Company, on an average of the last five years next preceding the organization of the

Chesapeake and Ohio Canal Company, were five thousand nine hundred and eighty-four dollars five cents and four fifths of one cent ($5,984 05⅘) or one-fifth of 29,920 29 dollars; believing that my views are in accordance with the true intent and meaning of the act of the Virginia Legislature passed on the 27th of January, 1824, this opinion is strengthened by the fact, as related to me by the secretary, John P. Ingle, of the Potomac Company, of that company having settled most of the claims against the Potomac Company, by giving the claimants a six per cent. stock for one half the amount of their claims, showing that the company put the same construction upon the law. From an examination of the original reports and papers in the possession of Robert Barnard, late Secretary of the Potomac Company, I am satisfied that the statements in papers marked B, C, & D, accompanying this report, are correct, or sufficiently near so for all practical purposes.

In relation to the amount of Joseph Smith's claim against the C. & O. C. Co., I have to report that he obtained a judgment against the said Company, at April term, in 1820, for the sum of twelve thousand seven hundred and fifty dollars, ($12,750,) to bear interest from the 20th June, 1818, and 21 61 dollars costs; on the judgment is endorsed, I (Joseph Smith, it is presumed,) presented this claim at the Potomac Company's office, in Georgetown, the 24th September, 1827, to Mr. Barnard, the Secretary, who said a copy of the claim is filed, and the claim is entered with the assignment to Holey & Suckley, with interest from 24th December, 1823; the amount of this assignment appears by the testimony of Robert Barnard, the statement of Master Commissioner Auld in his report, and the admission of Joseph Smith, to have been for four thousand dollars to bear interest from 24th December, 1823. On the books of the Chesapeake and Ohio Canal Company is the following entry—"George Sukely, New York, payable in debts of the Potomac Company four thousand dollars with interest from the 24th November, 1823." This the C. & O. C. Co. consider a subscription for that much stock; and as the amount corresponds with the sum assigned by Smith to Holey & Sukely, and the time from which it was to bear interest, agrees within one month, which mistake might easily be made, and George Sukely was one of the firm of Holey and Sukely, it is fair to presume that he intended it as a subscription, and purposed discharging it with Smith's assignment; Smith states that Sukely informed him that he had offered the claim in discharge of his subscription, and that the Ch. & O. C. Co. refused to admit it. Robert Barnard testifies that Sukely informed him that he considered the subscription cancelled. To the question, "did the Ch. & O. C. Company refuse to admit the claim of Holey & Sukely for 4,000 dollars, in payment of George Sukely's subscription put by me to Robert Barnard, he replied, that John P. Ingle was better acquainted with the circumstances than he was. To the same question put to John P. Ingle, he answered, that he had no recollection of such offer and refusal, and stated that the Chesapeake and Ohio Canal Company contended that if Smith's claim were a good one, and of consequence Holey & Sukely's for a part, the said Sukely would be bound to discharge his subscription with the amount assigned by Smith to Holey & Sukely. Not being satisfied, upon reflection, with the answer of Robert Barnard, relative to the refusal of the

C. & O. C. Co. to admit the claim of Holey & Sukely, though he very promptly gave me direct and satisfactory answers to all other questions propounded, and probably can give none more satisfactory to this, I addressed to him, through the post office, the queries in paper marked E, which have not yet been replied to. I also wrote to George Sukely, New York, requesting him to lay before me on or before the 1st day of September, any testimony in his power touching this matter. From him, I have no reply.* For the foregoing reasons I have made two statements in paper marked F., first, showing the amount of Joseph Smith's claim, if the subscription of George Sukely is cancelled and the assignment of Smith to Holey & Sukely annulled. Second, the amount after deducting the assignment to Holey & Sukely. In the first case, the amount, with interest to the 27th January, 1824, is $17,057 73, in the second $13,035 73, consequently the proportion which the demand of the complainant on the 27th January, 1824, bore to the sum of $175,800, will be either that of $17,057 73 to $175,800, or $13,035 73, to $175,800. And admitting my views, before expressed, to be correct, "the nett amount of the revenues of the Potomac Company on an average of the last five years next preceding the organization of the Chesapeake and Ohio Canal Company," $5,984 05$\frac{1}{5}$ per annum.

These statements embrace all the points on which I am directed to report. I have calculated the interest on the complainant's claim to the 27th January, 1824, under the direction of the court, though interest to the 16th May, 1825, was allowed by the company to all other creditors. Had the interest been calculated on the complainant's claim to May 16th, 1825, as in all other cases, his demand, principal and interest, would have been 18,054 36 dollars, provided the assignment to Holey and Sukely was not deducted, or $13,719 69, after deducting the assignment. At the time, January 27th, 1824, of the passage of the act by the Virginia Legislature, incorporating the Chesapeake and Ohio Canal Company, the debts of the Potomac Company were then assumed to be $175,800; the Canal Company finally assumed the payment of $175,325 76$\frac{3}{4}$, which sum was made up of principal and interest, to the 16th of May, 1825, from which it is evident that the Canal Company have only paid, or assumed the payment of a debt equal to one at the time of the passage of the act, of $162,614 71$\frac{3}{4}$, because that sum at an interest of 6 per cent. per annum, from the 27th January, 1824, to the 16th May, 1825, would have amounted, principal and interest, on the 16th May, 1825, to $175,325 76$\frac{3}{4}$, the amount which the Chesapeake and Ohio Canal Company, on the 15th day of August, 1828, admitted to be due from the Potomac Company; see certified list of debts. It appears to me, that either the other creditors were not entitled to interest from the 27th January, 1824, to May 16th, 1825, or that Joseph Smith, if entitled to any part of his demand, has a fair claim for interest to the 16th of May, 1825.

The parties have had notice of the time of closing this report. Joseph Smith, verbally, and the Chesapeake and Ohio Canal Company, by a written communication from me through the post office, directed to its Presi-

* Paper G. received after having made the report thus far.

dent, at Washington. The defendant failed to attend. The complainant attended some days previous to the time (September 8th,) fixing for closing the report.

Between the time of the complainant's attending and the day fixed upon for the closing of the report, the communication marked G, covering the papers marked H, & I, was received by me from George Sukeley, which is the only testimony furnished by him. All of which is respectfully submitted by

JOS. EACHES,
M. Commissioner.

Commissioner's Bill.

Fee 46½ hours at 75 cts. - - - - -	$34 87
Postages - - - - - - -	62
Expenses of 3 trips to Washington - - - -	2 06
	$37 55

Which sum, say thirty-seven dollars and fifty-five cents, I have received from the complainant, Joseph Smith.

JOS. EACHES, M. C.

A.

CANAL OFFICE, WASHINGTON,
June 23d, 1838.

DEAR SIR: I have your letter of the 20th, and in answer, say that I will be prepared to lay before you the books of the late Potomac Company, on either Monday, the 2d, or Tuesday, the 3d day of July next, as may best suit your convenience.

Respectfully,
Your ob't servant,

JOHN P. INGLE,
Clk. C. & O. C. Co.

JOS. EACHES, Esq.

B.

A Table, exhibiting the Gross Revenues of the Potomac Company, for five years immediately preceding the 1st of August, 1828, and the disbursements during the same period.

Years ending, 31st July.	GROSS REVENUES.			DISBURSEMENTS.				Nett Revenues.
	Rent.	Tolls.	Totals.	Salaries to treasurer & Col'r. of tolls, house and other expenses of hands employed to tend locks.	Repairs of locks and canal, & channels in the river.	Contingent expenses, office rent, law charges, postages, &c.	Per diem allowance of directors.	
1824,	90 00	9,851 13½	9,941 13½	2,147 53	692 76¾	628 57	58 13	6,414 13¾
1825,	90 00	9,843 34¾	9,933 34¾	2,174 23¾	48 20½	335 89¼	74 67	7,300 34¼
1826,	90 00	11,505 33¼	11,595 33¼	2,126 30	2,595 95½	560 16	140 47	6,172 44¾
1827,	90 00	10,821 78¼	10,911 78¼	2,171 13¾	2,888 22	370 57¾	133 33⅓	5,348 51⅓
1828,		11,895 24	11,895 24	2,228 50	4,258 83½	578 38¾	144 67	4,684 84¾
Dollars,	360 00	53,916 83¾	54,276 83¾	10,847 70½	10,483 98¼	2,473 58¾	551 27⅓	29,920 29

C.

The debts of the Potomac Company were reported to the Commissioners appointed by the States of Virginia and Maryland, by the Treasurer of that date, viz: on the 20th December, 1822, to amount, to principal and interest, aggregate, - - - - - - - - - - - $175,886 59

Of this true amount of original debt is found to be, - - - - - - - - 134,473 51½

Leaving as accretion of interest, - - - - - - - - - - 41,413 07½

Statement of the debts of the Potomac Company at the several dates stated below, and which were reported at those periods to be.

PRINCIPAL DEBT.

viz: 1st of August,	1823.	1824.	1825.	1826.	1827.	1828.
	147,616 43½	151,730 74½	151,428 25½	145,436 46½	141,491 89½	133,503 46½
Which sums were thus compounded, viz:						
Actual true principal, bearing interest	134,873 51½	134,473 51½	134,473 51½	128,483 72½	127,538 92½	120,216 45½
Interest added to principal, bearing interest,	10,608 72	16,048 03	16,087 99	16,087 99	13,952 97	13,287 01
Interest simply,	2,134 20	1,209 20	866 75	866 75		
	147,616 43½	151,730 74½	151,428 25½	145,438 46½	141,491 89½	133,503 46½
Besides which there were due for interest accrued on the foregoing, the sums of	36,347 16	37,721 60	45,985 31	54,827 84	61,086 90	67,345 92
Total amount of principal and in terest, Dolls	183,963 59½	189,452 34½	197,413 56½	200,266 30½	202,578 79½	200,849 38½

B.

A Table, exhibiting the Gross Revenues of the Potomac Company, for five years immediately preceding the 1st of August, 1828, and the disbursements during the same period.

Years ending, 31st July.	GROSS REVENUES.			DISBURSEMENTS.				Nett Revenues.
	Rent.	Tolls.	Totals.	Salaries to treasurer & Col'r. of tolls, house and other expenses of hands employed to tend locks.	Repairs of locks and canal, & channels in the river.	Contingent expenses, office rent, law charges, postages, &c.	Per diem allowance of directors.	
1824,	90 00	9,851 13½	9,941 13½	2,147 53	692 76¾	628 57	58 13	6,414 13¾
1825,	90 00	9,843 34¾	9,933 34¾	2,174 23¾	48 20½	335 89¼	74 67	7,300 34¼
1826,	90 00	11,505 33¼	11,595 33¼	2,126 30	2,595 95½	560 16	140 47	6,172 44¾
1827,	90 00	10,821 78¼	10,911 78¼	2,171 13¾	2,888 22	370 57¾	133 33⅓	5,348 51⅓
1828,		11,895 24	11,895 24	2,228 50	4,258 83½	578 38¾	144 67	4,684 84¾
Dollars,	360 00	53,916 83¾	54,276 83¾	10,847 70½	10,483 98¼	2,473 58¾	551 27⅓	29,920 29

C.

The debts of the Potomac Company were reported to the Commissioners appointed by the States of Virginia and Maryland, by the Treasurer of that date, viz: on the 20th December, 1822, to amount, to principal and interest, aggregate, - - - - - - - - - - $175,886 59

Of this true amount of original debt is found to be, - - - - - - - - 134,473 51½

Leaving as accretion of interest, - - - - - - - - - 41,413 07½

Statement of the debts of the Potomac Company at the several dates stated below, and which were reported at those periods to be.

PRINCIPAL DEBT.

viz: 1st of August,	1823.	1824.	1825.	1826.	1827.	1828.
	147,616 43½	151,730 74½	151,428 25½	145,436 46½	141,491 89½	133,503 46½
Which sums were thus compounded, viz:						
Actual true principal, bearing interest	134,873 51½	134,473 51½	134,473 51½	128,483 72½	127,538 92½	120,216 45½
Interest added to principal, bearing interest,	10,608 72	16,048 03	16,087 99	16,087 99	13,952 97	13,287 01
Interest simply,	2,134 20	1,209 20	866 75	866 75		
	147,616 43½	151,730 74½	151,428 25½	145,438 46½	141,491 89½	133,503 46½
Besides which there were due for interest accrued on the foregoing, the sums of	36,347 16	37,721 60	45,985 81	54,827 84	61,086 90	67,345 92
Total amount of principal and interest, Dolls	183,963 59½	189,452 34½	197,413 56½	200,266 30½	202,578 79½	200,849 38½

D.

Abstract from a schedule of the claims of the creditors of the Potomac Company, (exclusive of the lottery concern,) as appears by the books of said company, and the certified list of creditors.

	Principal.	Interest to May 16, 1825.	Total.
To sundries on open acc'ts	$566 70¾	$849 19	$1,415 89¾
To sundries for cash advances on certificate for improving Monocacy river	2,053 32	2,621 77	4,675 09
To sundries for cash advances on certificate for improving the Shenandoah river - - -	2,943 97	2,132 35	5,076 32
To sundries for cash advances on certificate for improving the Antietam river - - -	11,028 33	7,896 76	18,925 09
To sundries, per certificate of Eli Williams -	596 60	369 56	966 16
State of Maryland loan -	30,000 00	13,280 00	43,280 00
Current debt on note to banks in the District of Columbia - -	67,637 01	15,719 05	83,356 06
To the banks in the District of Columbia—special loan of 1816 -	17,631 15	-	17,631 15
Dollars -	132,457 08¾	42,868 68	175,325 76¾

E. E.

OFFICE POTOMAC COMPANY,
Georgetown, August 15th, 1828.

Signed

ROBERT BARNARD,
Treas. P. Co.

E.

Copy of the queries put to Robert Barnard, in writing, by Joseph Eaches, commissioner.

Is the following writing (on the books of the Chesapeake and Ohio Canal Company,) to wit: "George Sukely, New York, payable in debt of the Potomac Company, for four thousand dollars, with interest from the 24th of Nov., 1823," in the hand-writing of George Sukeley, or is his signature annexed? If not, by whom was it written? Did this subscription differ from the usual mode of subscribing; and, if so, in what did the difference consist? Have you any knowledge of the said Sukeley ever having offered in discharge of said subscription a part of Joseph Smith's claim on the Potomac Company? If so, was or was not the payment objected to by the Chesapeake and Ohio Canal Company? Have you any knowledge of any other material fact or facts relating to the assignment, by Joseph Smith to George Sukeley, or Holey & Sukeley, four thousand dollars of his claim on the Potomac Company, or of the subscription by said Sukeley for that amount of stock in the Chesapeake and Ohio Canal Company, calculated to throw any light upon the subject? If so, please to state it?

Sent by mail August 10th, 1838.

F.

Statement of Joseph Smith's claim against the Chesapeake and Ohio Canal Company, without deducting his assignment to Holey & Sukeley, with interest calculated to January 27th, 1824.

Joseph Smith's judgment *vs.* C. & O. C. C., - - -	$12,750 00
Int. from the 20th June, 1818, to Jan'y 27th, 1824, 5 yrs. 7 mo. 7 days, - - - - - - -	4,286 12
	$17,036 12
Costs of suit,	21 61
Amount due Jan. 27th, 1824,	$17,057 73

Statement of Joseph Smith's claim against the Chesapeake and Ohio Canal Company, deducting his assignment to Holey & Sukeley, with interest to the 27th January, 1824.

Judgment, - - - - - - -	$12,750 00
Interest from the 20th June, 1818, to 24 December, 1823, 5 yrs. 6 mo. 4 ds., - - - - - -	42 16
	$16,966 00
Dec. 24th, 1823, assigned this date to Holey & Sukeley,	4,000 00
	$12,966 00

Int. on 8,750 from 24th Dec., 1823, to Jan'y 27th, 1824, 1 mo. 3 ds., - - - - - - -	$48 12
	$13,014 12
Costs of suit,	21 61
Amount due January 27th, 1824,	$13,035 73

G.

NEW YORK, 31st August, 1838.

JOSEPH EACHES, Esq.

DEAR SIR: During my absence, I did not receive your respected favor of the 10th inst. until this day. In reply to which I send herewith a certified copy of Mr. Joseph Smith's assignment to me, the original of which being on file in the circuit court of Alexandria in the suit of State of Maryland, use of said Joseph Smith *vs.* the Potomac Company.

This assignment was for a full valueable consideration of four thousand dollars, and was intended as therein expressed, that I should receive that amount, with interest from 24th Nov., 1823, till paid, out of the first money that should be received, if so much be ever received; and if less be received, then I should receive all that should be recovered.

I also send herewith Mr. Joseph Smith's letter to me of the 1st June, 1833, and annexed is a copy of my answer thereto, which shows that he then considered me to have the full interest of his assignment. I received another letter from him, (which I cannot now lay hands on,) dated about two years ago, requesting that I would remit a *counsel* fee in his suit, which I did not, preferring to refer the matter to Robt. I. Taylor, Esq., who drew the assignment, and was knowing to the whole transaction, what I ought to bear, if any thing, either of the expenses or of the compromise, if it should be made.

I am, sir, most respectfully,
Your obed't servant,
GRORGE SUCKLEY.

I shall be very thankful for any further information on this subject, and of the result when known.

P. S. The assignment of Smith to me has never been annulled or abrogated in any respect.

I did subscribe for stock in the Ohio Canal Company, and immediately afterwards applied to have it annulled which I concluded was done, as I never received a certificate of stock, nor have I ever heard of it since,
G. S.

But if there be any stock in my name, I am willing to transfer it to Mr. Smith on receiving my share of what has been recovered.

Copy from George Suckley to Mr. Joseph Smith, Alexandria, in reply to his letter of 1st June, 1833, dated

NEW YORK, 27th July, 1833.

"In regard to the claim against the Potomac Company, if you judge it

best, and can make the compromise, I will make a fair and equitable abatement on my proportion of the claim according to the circumstances in which it is placed, as having the preference; or if you cannot bring them to a compromise that will be to your satisfaction, but prefer to prosecute this suit at law or in chancery, I will bear a part of the expense attending the same, in proportion of what each may receive in money so recovered.

"In case of a compromise, I shall be willing to leave it to the judgment of Robert J. Taylor, Esq., to say what proportion each shall receive according to the circumstances of the case."

Exceptions to Commissioner's report by defendant.

Exceptions to report filed by defendant.

JOSEPH SMITH,
vs.
The Chesapeake and Ohio Canal Company.

Defendants except to the reports of the commissioners appointed to audit and state the accounts in this cause.

1. Because the judgment claimed by complainant in this cause has been charged among the debts chargeable upon the nett amount of the revenues of the Potomac Company, under the 12th section of the charter of the Chesapeake and Ohio Canal Company.

2. Because the amount of said debt is overcharged in said reports.

3. Because complainant, upon his own showing in this suit, cannot claim so much of said judgment as he assigned to George Suckley or Holey and Suckley; and because said assignee or assignees cannot claim in this suit the amount of such assignment; yet the report of Commissioner Eaches allows alternatively to the complainant so much of said judgment as he had so assigned.

4. Because the nett amount of the revenues chargeable with the debts of said Potomac Company are overstated, and proper deductions therefrom are not stated and admitted.

5. Because the number and amount of the claims and debts between which, and the amount of the complainant's claim, the proportion of the latter claim chargeable on said revenues ought to be struck, is altogether mis-stated and underrated in said reports.

6. Because the said reports, and each of them, are erroneous and defective, and not conformable to the order of this court, nor to the right of the case, in other reports to be specified at the hearing.

W. JONES, *for Defendants.*

Final decree—Appeal.

And now here, at this day, to wit: at a court continued and held for the county and district aforesaid, the said 11th day of November, 1839, came the parties by their solicitors, and this cause coming on to be heard again on the bill, ans., exhibits, depositions, and documents, filed by

the parties, including the deeds from the complainant to Samuel Harper, the orders of the said Samuel on the complainant in favor of John McPherson and Son for $2500, the signatures of the complainant and the said Samuel, and the endorsement of John McPherson and Son being admitted to be genuine. It is the opinion of a majority of the court that the complainant is not entitled to relief, in equity, as prayed by him in his bill, the court, waiving the consideration of the reports of the commissioners and the exceptions thereto filed by the defendants, doth adjudge, order, and decree, that the complainant's bill be, and the same is hereby, dismissed; from which the complainant prays an appeal to the next Supreme Court of the United States; which is granted him on his giving bond with surety to be approved by one of the judges of this court, in the penalty of $200.

Record, State of Maryland (use, &c.) vs. Potomac Company.

Exhibits referred to in complainant's bill.

DISTRICT OF COLUMBIA, Alexandria County. } to wit:

Pleas before the honorable the judges of the United States circuit court of the District of Columbia for the county of Alexandria, the 21st day of April, 1820.

THE STATE OF MARYLAND, use of Joseph Smith, plaintiff,
against
The Potomac Company, defendants.

Be it remembered, that heretofore, to wit: at the rules held in the clerk's office of the said court for the month of March, in the year 1819, came the plaintiff aforesaid, by Thomas Swann, Esq., their attorney, and filed there a certain bill against the said defendants, which is in the words and figures following:

COUNTY OF ALEXANDRIA, *to wit:*

The State of Maryland complains of the Potomac company in custody, &c., of a plea that they render unto them six hundred thousand dollars, which to them they owe, and from them unjustly detain. For that whereas the said defendants, on the twenty-third day of May, in the year of our Lord one thousand eight hundred and ten, at the county aforesaid, by their certain writing obligatory, sealed with the seal of the said Potomac company, and to the court now here shewn, the date whereof is on the same day and year aforesaid, acknowledged themselves to be held and firmly bound to the said plaintiff, State of Maryland, in the said sum of six hundred thousand dollars, to be paid to the said State, when the said Potomac company should be thereunto required. Nevertheless the said Potomac company, although often required, the said sum of money to the said State of Maryland hath not paid, but the same to the said State to pay have altogether refused, and still do refuse, to the

damage of the said State of fifty thousand dollars, and, therefore, the said State brings suit, &c.

SWANN, for the Pl's., } J. DOE.
Pledges, &c. } R. DOE.

And the defendants having been arrested, and not appearing on the motion of the plaintiffs by their attorney, it is ordered that judgment be entered for the plaintiffs against the defendants, for the debt in the declaration mentioned, unless the said defendant shall appear and plead to issue at the next rules.

And at the rules held at the clerk's office of said court, for the month of April, in the same year, the defendants still failing to appear, on the motion of the plaintiffs by their attorney, it is ordered that the last order made in this cause be confirmed.

At another day, to wit: at a court continued and held for the district and county aforesaid, the 18th day of December, 1819, this cause was continued.

And at a court continued and held for said district and county the 11th day of December, 1819, came the plaintiffs by their said attorney, and the defendants by Walter Jones, Esq., their attorney, and by consent, an amended declaration is filed.

And now here, at this day, to wit: at a court continued and held for the district and county aforesaid, the twenty-first day of April, 1820, came the parties aforesaid by their attorneys, and the defendants, by their said attorney, say that they have well and truly observed and performed the condition of the writing obligatory in the declaration mentioned, and of this they put themselves upon their country, and the plaintiffs likewise; and thereupon the said State of Maryland by their said attorney saith, that they ought not to be precluded from having and maintaining their action aforesaid, by any thing alleged by the said defendants in their plea aforesaid; because the said plaintiffs say that the said defendants have not well and truly performed the condition of the said writing obligatory, but hath broken the same in this: that the drawing of the said lottery in the condition of the said writing obligatory mentioned was finished on the day of April, 1818; and that a certain ticket issued and sold by the said Potomac company, in these words and figures:

Potomac and Shenandoah Navigation Lottery, No. 2. *(Second Class.)* } No. 24,756.

By authority of the State of Maryland. This ticket will entitle the bearer to such prize as may be drawn to its number in the second class, if demanded within twelve months after the drawing shall have been completed: subject to a deduction of fifteen per cent.

By order of the president and directors of the Potomac company.

January 1812. JONAH THOMPSON, Treasurer.

purchased, owned, and held by one Joseph Smith, drew a prize of $15,000; and although the said Potomac company, sixty days after drawing of the said Lottery had been completed, that is to say, on the day of June,

1818, was required to pay to the said Joseph Smith the said sum of 15,000 dollars, subject to a deduction of fifteen per centum as aforesaid, yet the said company altogether failed to pay the said sum of money, or any part thereof, to the said Joseph Smith, and still doth refuse to pay the same to the said Joseph, and this the said Joseph is ready to verify, &c., and general rejoinder and issue; and thereupon came a jury, to wit: John Grubb, John Shakes, Benjamin Baden, Reuben Johnston, Jno. W. Massie, David Marll, Peter Saunders, Ambrose Vasse, William H. Brown, Joseph Rinker, Elisha Talbott and Joseph Janney, who being sworn and affirmed, returned the following verdict, to wit: "We, of the jury, find for the plaintiffs and assess their damages, by reason of the breach of the condition of the bond in the declaration mentioned, to the sum of twelve thousand seven hundred and fifty dollars, being the principal sum due, to carry interest from the 20th day of April, 1818, till paid. Therefore it is considered by the court that the plaintiffs recover of the said defendants the said sum, 12,750 dollars, with interest as aforesaid, in manner and form as by the jury aforesaid assessed, and their costs by them about this suit in their behalf expended.

And the said defendants, in mercy, &c.

Potomac and Shenandoah Navigation Lottery.

By authority of the State of Maryland.

Scheme of a Lottery,

For improving the navigation of the Potomac and Shenandoah rivers.

Second Class of 25,000 tickets.				Stationary Prizes.	
1	prize of	20,000	$20,000	1st drawn ticket, 1st day,	$2,000 00
1	"	15,000	15,000	1st drawn, 5,000 blanks, each entitled to,	10 00
1	"	10,000	10,000	Next drawn, 2,000 blanks, each entitled to,	12 00
2	"	5,000	10,000	1st drawn ticket, 5th day,	500 00
4	"	2,000	8,000	1st drawn ticket, 10th day,	1,000 00
15	"	1,000	15,000	1st drawn ticket, 15th day,	500 00
10	"	100 tickets in this class	8,500	1st drawn ticket, 20th day,	2,000 00
20	"	5,00	10,000	1st drawn ticket, 25th day,	1,000 00
30	"	1,00	3,000	1st drawn ticket, 28th and 29th days, each,	500 00
50	"	50	2,500	1st drawn ticket, 30th day,	5,000 00
2,500	"	12	30,000	1st drawn ticket, 31st, 32d, 33d, and 34th days, each,	1,000 00
8,050	"	10	80,500	1st drawn ticket, 35th day,	10,000 00
10,684 prizes amounting to			$212,500	1st drawn ticket, 36th, 37th, 38th, and 39th days, each,	500 00
14,316 blanks, not 1½ to a prize				1st drawn ticket, 40th day,	15,000 00
25,000 tickets at $8 50			$212,500	1st drawn ticket 42d, and 44th days, each,	1,000 00
				500 tickets to be considered one day's drawing.	

First drawn ticket, the 16th, 17th, 18th, 19th, 21st, 22d, 23d, 24th, 26th, and 27th days (the tickets constituting prizes excepted,) each entled to 100 tickets in this class.

Prizes payable sixty days after the drawing is completed, subject to 15 per cent. deduction. (It was completed 21st April, 1818.)

Last drawn 300 tickets, each day, from the 41st to the 50th day inclusive, entitled to 10 dollars, payable in tickets in the third class.

The tickets constituting prizes in this class to consist of the numbers from 10,001 to 11,000 inclusive; each hundred to be one prize, the lowest hundred for the 16th day, the next lowest for the 17th day, and so on until the 10 prizes are drawn.

Purchasers of 100 tickets or more, to be entitled to a credit of thirty days after the drawing of this class for notes with approved endorsers.

All prizes not demanded within 12 months after the drawing of this class will be considered as given up for the benefit of the lottery.

Each prize of 10 dollars drawn in the first class will be received in payment of tickets in this class at eight dollars and fifty cents.

The managers of the Potomac and Shenandoah Navigation Lottery having completed the drawing of the first class, they trust to the satisfaction of all concerned, which has given a stimulus to the improvement of the navigation of those rivers, that promises a speedy completion of that useful work, offer this scheme to the public under a well founded expectation that it will meet with their approbation and support, particularly of all immediately interested in making those rivers navigable at all seasons.

CHARLES SIMMS, President.

JOHN MASON,
JONAH THOMPSON,
WILLIAM STEWART,
GEORGE PETER. } Directors.

W. Cooper, Printer, Washington.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America, to the marshal of the District of Columbia, greeting:

We command you that you summon John A. Stewart and Samuel Snowden, to appear before the honorable the judges of the circuit court of the District of Columbia for the county of Alexandria, at the court house in the town of Alexandria, on the tenth day of the present court, which commenced on the fourth Monday in November, to testify, and the truth to say, on behalf of the state of Maryland in a certain matter of controversy in our said court depending and undetermined, between the State of Maryland and the Potomac Company; and this they shall in no wise omit, under the penalty of $333 33; and have then and there this writ.

Witness, William Cranch, Esq., chief judge of our said court, this 24th day of November, 1819.

EDM. I. LEE, C. C.

(Endorsed)—Summoned.

D. MINOR, D. M.

DISTRICT OF COLUMBIA, to wit:

The United States of America to the Marshal of the District of Columbia, greeting:

We command you, that you summon Joseph Brewer to appear before the honorable, the judges of the circuit court of the District of Columbia, for the county of Alexandria, at the court house, in the town of Alexandria, on the 4th day of present court, which commenced on the 4th Monday in April, to testify, and the truth to say, on behalf of the State of Maryland, use of Joseph Smith, in a certain matter of controversy in our said court depending and undetermined, between the said State and the Potomac Company; and this he shall in no wise omit, under the penalty of $333 33 cents, and have then there this writ.

Witness, William Cranch, Esq., Chief Judge of our said court, this 19th day of April, in the year of our Lord 1820.

EDM. I. LEE, C. C.

[Endorsed]—Summoned.

TENCH RINGGOLD,
Marshal.

DISTRICT OF COLUMBIA, to wit:

The United States of America to the Marshal of the District of Columbia, greeting:

We command you, that you summon Samuel Snowden, John A. Stewart, and Robert Gray to appear before the honorable the judges of the circuit court of the District of Columbia for the county of Alexandria, at the court house in the town of Alexandria, on the fourth day of the next court, which commences on the third Monday in April, to testify, and the truth to say, on behalf of State of Maryland, "use," &c., in a certain matter of controversy in our said court depending and undetermined, between said State and the Potomac Company; and this they shall in no wise omit under the penalty of $333 33 cts, and have then there this writ.

Witness, William Cranch, Esq., Chief Judge of our said court, this 14th day of April, 1820.

EDM'D I. LEE, C. C.

[Endorsed]—Summoned, Snowden, and Stewart. Non est, Gray.

T. RINGGOLD,
Marshal.

DISTRICT OF COLUMBIA, to wit:

The United States of America to the Marshal of the District of Columbia, greeting:

We command you, that you summon James Moore, Jr. to appear and bring with him the running book of the daily drawing of the Potomac and Shenandoah Navigation lottery, class No. 2, before the honorable the

judges of the circuit court of the District of Columbia, for the county of Alexandria, at the court house in the town of Alexandria, immediately, to testify, and the truth to say, on behalf of the State of Maryland, "use of Joseph Smith," in a certain matter of controversy in our said court depending and undetermined, between the said State and the Potomac Company. And this he shall in no wise omit, under the penalty of $333 33 cts., and have then there this writ.

Witness, William Cranch, Esq., Chief Judge of our said court, this 20th day of April, in the year of our Lord 1820.

EDM'D I. LEE, C. C.

[Endorsed]—Summoned.

TENCH RINGGOLD,
Marshal.

(A copy.) Test:

EDM. I. LEE, C. C.

Exhibits referred to in the Answer.

MARYLAND, sct:

At a session of the General Assembly of Maryland begun and held at the city of Annapolis on Monday the sixth day of Novemeer, in the year of our Lord one thousand eight hundred and nine, and ended the eighth day of January, one thousand eight hundred and ten: His Excellency, Edward Lloyd, Esquire, Governor.

Amongst others, the following law was enacted, to wit:

Act of the Legislature of Maryland authorising the Lottery referred to in the Answer.

No. 193. An act to authorize the President and Managers of the Potomac Company to raise a sum of money by lottery or lotteries, for the purposes therein mentioned.

Be it enacted by the General Assembly of Maryland: That it shall and may be lawful for the President and Managers of the Potomac Company to propose a scheme of a lottery or lotteries for raising a sum of money not exceeding three hundred thousand dollars, for the purposes of improving the navigation of the river Potomac and the tributary streams thereof, and to sell and dispose of the tickets thereof in any part of the State of Maryland: Provided, the said President and Managers, before they shall undertake to act under this law, shall, before the sale or disposal of any ticket or tickets in said lottery or lotteries, give their bond to the State of Maryland in the penalty of six hundred thousand dollars, conditioned that they will well and truly apply so much of the money arising therefrom, within six months after the drawing of said lottery or lotteries shall commence, as will satisfy the fortunate adventurers for prizes drawn by them, and after deducting the necessary expenses incurred in said lottery or lotteries, shall, within twelve months from the time the drawing of said

lottery or lotteries shall commence, applying the money raised by such lottery or lotteries for improving the navigation of the river Potomac and the tributary streams thereof.

And be it enacted, That it shall be the duty of the said president and managers, before they act as such, to lodge the bond made and entered into as aforesaid, in the office of the clerk of the court of appeals for the western shore, there to be recorded, and upon such bonds or any office copy thereof suit or suits may be instituted against the obligors therein, or any of them, or their legal representatives, for any breach or non-compliance with the conditions of the same.

By the House of Delegates, January 7th, 1810. Read and assented to.

By order, THOS. ROGERS, Clerk.

EDW. LLOYD.

[The great Seal in wax appendant.]

MARYLAND, *sct.*

I do hereby certify that the foregoing is a true copy taken from Liber T. H., No. 2, folio 405, &c., one of the law records of the State of Maryland, belonging to the office of the court of appeals, for the western shore of said State.

In testimony whereof I hereunto subscribe my name, and affix the seal of the said court of appeals, this thirteenth day of March, in the year of our Lord one thousand eight hundred and eighteen.

[Seal of the Court of Appeals.]

THOMAS HARRIS, Clk. Ct. Apps.

Know all men by these presents, that the Potomac company are held, and firmly bound to the State of Maryland, in the just and full sum of six hundred thousand dollars, to be paid to the said State of Maryland. To which payment well and truly to be made, the said Potomac company bind themselves and their successors firmly by these presents. In testimony whereof, the said Potomac company have caused the seal of the said company to be hereunto affixed this twenty-third day of May, one thousand eight hundred and ten. Whereas by an act of assembly of the State of Maryland, entitled "an act to authorize the president and managers of the Potomac company to raise a sum of money by lottery or lotteries, for the purposes therein mentioned," the president and directors of the Potomac company are authorised to raise a sum of money by lottery or lotteries, not exceeding three hundred thousand dollars, for the purpose of improving the navigation of the river Potomac, and the tributary streams thereof. Now the condition of the above obligation is such, that if the president and directors of the Potomac company shall well and truly apply so much of the money arising therefrom, within six months after the drawing such lottery or lotteries shall commence, as will

satisfy the fortunate adventurers for prizes drawn by them, and, after deducting the necessary expenses incurred in said lotter yor lotteries, shall, within twelve months from the time the drawing of said lottery or lotteries shall commence, apply the money raised by said lottery or lotteries, for improving the navigation of the river Potomac and the tributary streams thereof, then the above obligations to be void, otherwise to remain in full force and virtue.

Sealed and delivered in presence of
JOS. CARLETON, Treasurer of Potomac company,
JOHN MURDOCK,
M. FITZHUGH.

[Seal of the Potomac company.]

(Recorded the 29th of May, 1810.)

MARYLAND, *sct.*

I hereby certify, that the foregoing is a full and true copy taken from Liber J. G. No. 7, folio 355, one of the land records of the court of appeals for the western shore of Maryland.

In testimony whereof, I hereunto subscribe my name, and affix the seal of the said court of appeals, this thirteenth day of March, in the year of our Lord one thousand eight hundred and eighteen.

[Seal of the Court of Appeals.]

THOMAS HARRIS, Clk. Ct. App. W. S.]

Potomac and Shenandoah Navigation lottery.

Correspondence referred to in defendant's answer, No. 1.

Correspondence with the commissioners of lotteries, referred to in defendant's answer.

No. 1.

OFFICE OF THE POTOMAC COMPANY,
Georgetown, 17th April, 1826.

The commissioners of lotteries for the State of Maryland:

By the act of the General assembly of Maryland, passed 7th January, 1810, the Potomac Company were authorised to propose a scheme of a lottery or lotteries for raising a sum not exceeding $300,000, for certain purposes mentioned in said act.

In pursuance of which the Company have drawn two classes of a lottery, viz: in the years 1811–12 and 1817–18; but so far from their raising any money thereby, a combination of unfortunate circumstances caused these two classes to come up with considerable loss. In order to retrieve this loss if possible, and fulfil the requisitions of said act, the company are de-

sirous to propose one or more classes to be drawn in Maryland. But as a subsequent act of the State directed that all lotteries should, after its date, be drawn in the order in which their acts had been respectively passed, it is necessary for the company to ascertain whether they are not by this time entitled to their turn for drawing additional classes of the Potomac and Shenandoah lottery, in compliance with the aforesaid act of 7th January, 1810.

You will, therefore, much oblige the board of directors by informing them on this head, and if their turn be not yet arrived, which surely it must have done ere this—by stating what number of lotteries and the titles which may yet be drawn before the Potomac and Shenandoah lottery may come into rotation.

Your obedient servant,

ROBERT BARNARD,
Treasurer Potomac Company.

No. 2.

OFFICE OF THE LOTTERY COMMISSIONERS,
July 26th, 1826.

SIR: It appears by the act of assembly, passed December session, 1818, chapter 161, entitled "A supplement to the act entitled an act to regulate lotteries," that the Potomac Company have forfeited their grant to draw any further scheme under the authority of the act of the General Assembly of Maryland, passed 7th January, 1810.

On the 2d May, 1825, the managers of the Washington Monument Lottery relinquished their claim of drawing any further scheme or lottery under their grant, the tax on which had been remitted by the Legislature of Maryland. Due notice of this fact was given in the public prints in this city of the provision of the act of 1818, chapter 161, with a view that the managers of the several lotteries under the authority of the State might avail themselves of the provisions of said act previous to the 3d September, 1825.

The board of lottery commissioners have decided that the managers of the Potomac Company have forfeited their claims to draw any further scheme or schemes of a lottery under the grant of January 7, 1810.

Very respectfully, &c.

JAS. L. HAWKINS,
Chairman of the Lottery Commissioners.

P. S. These proceedings took place on the 12th May last, and I must beg pardon for not before informing you of the same.

To ROBT. BARNARD, &c.

The first section enacts that managers, whose right to draw comes in rotation, who do not signify their wishes to have lottery drawn before the 1st March, 1820, forfeit their right.

2nd section. No lottery to be drawn unless receipt for the tax of 5 per cent. on the gross amount of prizes therein, being paid, be presented to the commissioners of lotteries.

Deposition of Saml. B. Harper.

The deposition of Samuel B. Harper, taken at the office of Charles Scott, in the town of Alexandria, on the 27th day of May, 1836—to be read in evidence in a suit depending before the circuit court of the District of Columbia at Alexandria, in which Joseph Smith is complainant, and the Chesapeake and Ohio Canal Company are defendants.

The said deponent, being first duly sworn, testifies and says that his father, Samuel Harper, late of Alexandria, deceased, purchased of one John Swain a ticket in the last drawn lottery, called the Potomac and Shenandoah Navigation lottery, which at the time of the purchase had drawn a prize of fifteen thousand dollars; that in the fall of the year 1818 his father sold the said ticket to the complainant, Joseph Smith, for thirteen thousand dollars, to be paid for in merchandise and real property, at valuation, in the town of Alexandria; and that the said merchandize and real property were delivered and conveyed by the complainant to this deponent's father or his order; and that the paper hereto annexed contains a true statement of the manner in which the said ticket was paid for—and further he saith not.

SAMUEL B. HARPER.

Taken before me as above stated.

CHARLES SCOTT.

Memorandum from my books for Samuel Harper, Esq.

October 16, 1818.

Samuel Harper Dr. to sundries.

To m'dse, amount of goods delivered to your order, in favor of Daniel McPherson & Son - - - -	$2,500
To one brick house and lot on Fairfax street - -	3,500
To one house and lot, formerly Jerome Plummer , - -	5,000
To one house and lot corner King and Herney streets -	2,000
	$13,000

Cr.

By one prize ticket in the Potomac and Shenandoah Navigation Lottery, $15,000 - - - - -	$13,000

Deed, Joseph Smith and wife to Samuel Harper.

This indenture, made this third day of December, in the year of our Lord one thousand eight hundred and eighteen, between Joseph Smith and Mary his wife, of the town of Alexandria, in the District of Columbia, of the one part, and Samuel Harper of the same place, of the other part, Witnesseth that the said Joseph Smith and Mary his wife, for and

in consideration of the sum of five thousand dollars, current money of the United States, to the said Joseph Smith in hand paid by the said Samuel Harper, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, aliened, and confirmed, and by these presents do give, grant, bargain, sell, alien, and confirm, unto the said Samuel Harper, his heirs and assigns forever, a lot and part or parts of a lot of ground situated, lying, and being, on the west side of Patrick street, between King and Prince streets, in the said town of Alexandria, and bounded as follows, to wit: beginning at the distance of one hundred and ten feet from the intersection of Prince and Patrick streets, and running with the west side of Patrick street sixty-six feet seven inches; thence, westwardly, parallel with Prince street, one hundred feet; thence, northwardly, parallel with Patrick street, sixty-six feet seven inches, to a ten feet alley; thence, westwardly, and parallel to Prince street, with said alley, twenty-three feet five inches; thence, southwardly, parallel with Patrick street, sixty-six feet seven inches; thence, parallel to Prince street, westwardly to Henry street, one hundred and twenty-three feet five inches; thence, southwardly, with Henry street, seventy one feet seven inches; thence, eastwardly, parallel with Prince street, one hundred and twenty-three feet five inches; thence, northwardly, parallel to Patrick street, five feet; thence, eastwardly, parallel to Prince street, one hundred and twenty-three feet five inches, to the beginning. Which was sold and conveyed by Alexan- Moore and Colin Auld, (commissioners under a decree of the United States circuit court of the District of Columbia, for the county of Alexandria,) unto Joseph Smith by deed dated the tenth day of December, 1817, subject to the dower of Henrietta Plummer, widow of Jerome Plummer, deceased; and on the twenty-sixth day of December, 1818, the said Henrietta Plummer released her right of dower to the said Joseph Smith, which will more fully appear, reference being had to the said conveyance and release of dower, on record in Alexandria county, and all appurtenances whatsoever unto the said lot and part or parts of a lot of ground, belonging or in any wise appertaining. To have and to hold the said hereby granted premises and appurtenances, unto the said Samuel Harper, his heirs and assigns forever, to his and their only proper use. And the said Joseph Smith doth, for himself, his executors, and administrators, covenant, grant, and agree, to and with the said Samuel Harper, his heirs and assigns, that the said Joseph Smith is now, at the time of the sealing and delivering of these presents, seized in his own right of a good, sure, and absolute estate of inheritance in fee simple, of and to the said lot and part or parts of a lot of ground hereby granted, and appurtenances, without any manner of condition, mortgage, limitation of use or uses, or any other matter, cause, or thing, to alter, charge, or determine the same. And, also, that the said Joseph Smith and his heirs will at any time hereafter, at the request, cost, or charge of the said Samuel Harper, his heirs and assigns, execute and acknowledge any further deeds for the more certain assuring and conveying the said lot and part or parts of a lot of ground, and appurtenances unto him the said Samuel Harper, his heirs and assigns, as by him, his heirs and assigns, his or their counsel learned in the law, shall or may be advised or required.

And lastly, that the said Joseph Smith and his heirs, the said lot and part or parts of a lot of ground and appurtenances unto him the said Samuel Harper, his heirs and assigns, against the claims and demands of all persons whomsoever, shall and will warrant, and forever defend by these presents.

In witness whereof, the said Joseph Smith, and Mary his wife, have hereto set their hands and seals, the day, month, and year first herein written.

Signed, sealed and delivered in presence of

JOSEPH SMITH. [SEAL.]
MARY SMITH. [SEAL.]

At an United States circuit court of the District of Columbia, continued and held for the county of Alexandria, the 17th day of December, 1818, this deed from Joseph Smith and Mary his wife, to Samuel Harper, was acknowledged by the said Joseph Smith to be his act and deed; which, together with a commission and return for the privy examination of Mary Smith, wife of the said Joseph Smith, was ordered to be recorded.

Test: EDMD. I. LEE, C. C.

2d Deed, Smith and wife to Harper.

This indenture, made this twentieth day of October, in the year of our Lord one thousand eight hundred and eighteen, between Joseph Smith and Mary, his wife, of the town and county of Alexandria, of the one part, and Samuel Harper, of the town, county and district aforesaid, of the other part, witnesses, that the said Joseph Smith and Mary, his wife, for and in consideration of the sum of two thousand dollars, lawful money of the United States to them in hand, by the said Samuel Harper, at or before the sealing and delivery of these presents, the receipt whereof, is hereby acknowledged, have granted bargained, sold, aliened, released and confirmed, and by these presents do grant, bargain and sell, alien, release and confirm unto him, the said Samuel Harper, his heirs and assigns, a certain piece or parcel of ground, situate, lying and being in the said town of Alexandria, and bounded as follows, to wit: Beginning at the intersection of King and Patrick streets, and running thence southwardly with Patrick, and parallel thereto, one hundred feet to a ten feet alley; thence westwardly, and parallel with King street, twenty-five feet; thence northwardly, and parallel with Patrict street, one hundred feet; thence eastwardly, parallel with King street, and binding thereon twenty-five feet, to the beginning. Which said piece or parcel of ground was conveyed in fee simple to the said Joseph Smith, by Abraham Faw, and Sarah his wife, by deed, dated the 4th day of April, in the year of our Lord 1809, and duly recorded in the clerk's office in Alexandria; to hold the said piece or parcel of land as aforesaid, with all and singular the appurtenances thereunto belonging to him, the said Samuel Harper, his heirs and assigns forever, to his and their only proper use, and behoof, his and their assigns forever. And the said Joseph Smith and Mary, his wife, do covenant to, and with the said Samuel Harper, his heirs and assigns, that he, the said Joseph Smith, and Mary his wife, have now a good right, lawful and ab-

solute power and authority in themselves to grant, alien and convey the said piece or parcel of ground as aforesaid, with the appertenances to him the said Samuel Harper, his heirs and assigns, to their only use, forever. And the said Joseph Smith, and Mary his wife, do hereby covenant for themselves and their heirs, that the said Joseph Smith, and Mary his wife, the said piece or parcel of ground as aforesaid, with all and singular the appurtenances unto the said Samuel Harper, his heirs and assigns, against them the said Joseph Smith, and Mary his wife, and their heirs, and against all and every other person or persons whatsoever, shall and will warrant and forever defend by these presents.

In witness whereof, the said Joseph Smith, and Mary his wife, have hereunto set their hands and affixed their seals, the day and year first above written.

JOSEPH SMITH. [SEAL.]
MARY SMITH. [SEAL.]

Sealed and delivered in presence of

Recorded 17th day of Dec., 1818.

3d Deed from Smith and wife to Harper.

This indenture, made this sixteenth day of October, in the year of our Lord 1818, between Joseph Smith, and Mary his wife, of the town of Alexandria, in the District of Columbia, of the one part, and Samuel Harper, of the same town, county and district aforesaid, of the other part, Witnesseth that the said Joseph Smith, for and in consideration of the rents and covenants hereinafter contained and expressed, on behalf and on the part of him, the said Samuel Harper, his heirs and assigns, to be paid, kept, and performed, as of the three thousand five hundred dollars, to him, the said Joseph Smith, in hand paid by him, the said Samuel Harper, at or before the sealing and delivery of these presents, (the receipt whereof he doth hereby acknowledge,) and *therefore* and of every part and parcel thereof doth release, acquit, and discharge him, the said Samuel Harper, his heirs, executors, and administrators, by these presents, hath given, granted, bargained, sold, and by these presents do give, grant, bargain, and sell, alien, and confirm unto him, the said Samuel Harper, his heirs and assigns forever, a piece of ground, situate, lying, and being on the west side of Fairfax street, in the said town of Alexandria, beginning at Edward Stabler's lot on the west side of Fairfax street, bounding on Fairfax street, north, eighteen feet six and a half inches; thence west, parallel to King street, forty feet; thence south, parallel to Fairfax street, eighteen feet six and a half inches; thence to the beginning forty feet. "Reserving the right and privilege of using the north end of the wall to build against, and letting the joice in the wall of the house." Which piece of ground was granted by Robert I. Taylor, executor of John Walls, deceased, unto him, the said Joseph Smith, by an indenture bearing date the twenty-seventh day of June, in the year one thousand eight hundred and fifteen, subject to the payment of a rent of fifty dollars unto the heirs of Richard Arell, yearly, and every year, forever, upon the seventeenth day of December, in each year; and all houses,

buildings, streets, lanes, profits, alleys, commodities, hereditaments, and appurtenances whatsoever, to the said premises belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof and of every part and parcel thereof. To have and to hold the said piece of ground, hereditaments and appurtenances, and all and singular the premises hereby granted, with their appurtenances, unto him, the said Samuel Harper, his heirs and assigns, to the only proper use and behoof of him, the said Samuel Harper, his heirs and assigns forever. He, the said Samuel Harper, his heirs and assigns, paying unto the heirs of Richard Arell, upon the 17th day of December next ensuing the date of these presents, and yearly and every year forever afterwards, upon the said seventeenth day of December, in each year, the said rent of fifty dollars. And the said Samuel Harper doth, for himself and his heirs, executors, and administrators, covenant, grant, and agree to and with the said Joseph Smith, his heirs, executors, and administrators, that his the said Samuel Harper, his heirs and assigns, will well and truly pay unto the said heirs of Richard Arell, upon the seventeenth day of December next ensuing the date of these presents, and yearly and every year forever afterwards, upon the said seventeenth day of December, in each year, the said rent of fifty dollars. Provided always, and it is hereby conditioned, covenanted, granted, and agreed upon between the said parties, that if the said rent or any part of it shall at any time hereafter be in arrear for the space of sixty days, and goods and chattels cannot be found upon the said premises, whereupon to levy the rent, so in arrear, by distress and sales, these presents and every thing herein contained shall cease, determine, and be absolutely void, and it shall be lawful for the said Joseph Smith, his heirs, executors, and administrators thereupon, or at any time thereafter, in and upon all and singular, the said premises with their appurtenances, to re-enter, and him, the said Samuel Harper, his heirs and assigns, from thence to remove, eject and expel, and the same to have, hold, occupy, and possess, as in the former estate of him, the said Joseph Smith, any thing herein contained to the contrary thereof in anywise notwithstanding. And the said Joseph doth for himself, his heirs, executors, and administrators, covenant, grant, and agree. to and with the said Samuel Harper, his heirs and assigns, that he, the said Joseph Smith, and his heirs, all and singular, the said premises with their appurtenances, unto him, the said Samuel Harper, his heirs and assigns, (he the said Samuel Harper, his heirs and assigns, paying the said rent at the time, and in the manner directed) against the claims and demands of him, the said Joseph Smith, and his heirs, and all and every other person or persons whatsoever, shall and will warrant and forever defend by these presents.

In witness whereof the parties have hereunto set their hands and seals the day and year first hereinbefore mentioned.

JOSEPH SMITH, [SEAL.]
MARY SMITH, [SEAL.]
SAMUEL HARPER, [SEAL.]

Sealed and delivered in the presence of us

At an United States circuit court of the District of Columbia, continued and held for the county of Alexandria, the seventeenth day of December, 1818, this deed from Joseph Smith and Mary, his wife, to Samuel Harper, was acknowledged by the said Joseph Smith, and Samuel Harper, to be their act and deed, which, together with a commission for the privy examination of Mary Smith, wife of the said Joseph, ordered to be recorded.

Test. EDM'D I. LEE, C. C.

ALEXANDRIA, 17th October, 1818.

MR. JOSEPH SMITH:

Will please deliver Messrs. John McPherson & Son, or order, twenty-five hundred dollars in goods, as per agreement, and oblige

Yours, &c.,
SAMUEL HARPER.

Accepted: JOSEPH SMITH.

Endorsed—JOHN MCPHERSON & SON.

Claim presented to Potomac Co.

Joseph Smith of Alexandria, District of Columbia, has this 11th day of August, 1828, presented his claim against the Potomac Company for a judgment he obtained in the circuit court of the county of Alexandria, for twelve thousand seven hundred and fifty dollars, with legal interest from the 20th day of June, 1818, and costs, $22 41; which judgment with interest and costs amount to twenty thousand four hundred twenty-two dollars and 41 cents, on the 20th of June, 1828. Of this sum he assigned to Holey & Suckley four thousand dollars, with legal interest from the 24th December, 1824, without recourse.

Joseph Smith requests that the above judgment may be certified to the Chesapeake and Ohio Canal Company, under the provisions of their charter, and if such certificate be refused, that this, his application, and the refusal of the certificate, may be noted on the minutes of the Potomac Company.

I hereby certify, that Mr. Smith has delivered a paper to the treasurer of the Potomac Company, of which the above is a true copy, having read the same in my presence.

THOS. D. GOSSZLER.

Aug. 11th, 1828.

In the case of JOSEPH SMITH,
vs.
CHESAPEAKE AND OHIO CANAL COMPANY.

Agreement of Counsel.

It is agreed that a gen'l rep. shall be entered as filed by the compl't to the defendant's answers, and that the cause be entered as set for hearing

on the bill, answers, exhibits, depositions and documents filed by the parties, including the deeds from Joseph Smith to Samuel Harper (three in number) now filed, and the order of Samuel Harper on Joseph Smith, in favor of John McPherson & Son, for twenty-five hundred dollars, the signatures to which of Samuel Harper and Joseph Smith, and the endorsement of John McPherson & Son, being admitted to be genuine.

R. I TAYLOR, for Compl't.
THOMSON F. MASON, for Defts.

Bond.

Know all men by these presents, that we, Joseph Smith and J. B. Hill, are held and firmly bound unto the Chesapeake and Ohio Canal Company in the full and just sum of two hundred dollars, to the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twenty-fifth day of November, 1839. Whereas, at an United States circuit court of the District of Columbia, continued and held for the county of Alexandria, the 11th day of November, 1839, in the cause of Joseph Smith, complainant against, the Chesapeakeand Ohio Canal Company, defendants, it was. by the said court, decreed and ordered that the complainant's bill be dismissed with costs; from which decree the complainant prayed and obtained an appeal to the Supreme Court of the United States, to be holden at Washington, the present seat of the National Government. Now the condition of the above obligation is such, that if the said Joseph Smith shall prosecute his said appeal and pay all costs and charges which may be awarded against them, in case he shall fail therein, then the above obligation to be void, else to remain in full force and virtue.

JOSEPH SMITH, [SEAL.]
JOSIAH B. HILLS, [SEAL.]

Sealed and delivered in the presence of
E. WHEELER.

Approved: W. CRANCH.

DISTRICT OF COLUMBIA, Alexandria county, to wit:

I, Edmund I. Lee, clerk of the United States circuit court of the District of Columbia, for the county of Alexandria, hereby certify, that the foregoing is a true transcript of the record of the proceedings in a certain suit in chancery, lately depending in said court, in which Joseph Smith was compl't, and the Chesapeake and Ohio Canal Company were defendants, with all things touching the same, as fully as they exist among the records of my office.

In testimony whereof, I hereto subscribe my name, and affix the [SEAL.] seal of said court this 30th day of December, 1839.

EDM. I. LEE, C. C.

536.

SUPREME COURT OF THE UNITED STATES.

No. 51.

RICHARD. R. KEENE, PLAINTIFF IN ERROR,

vs.

WARREN WHITTAKER ET AL.

IN ERROR TO THE CIRCUIT COURT U. S. EAST LOUISIANA.

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Langtree & O'Sullivan, Print.

CIRCUIT COURT OF THE UNITED STATES,
Ninth Judicial Circuit of the Eastern District of Louisiana.

Be it remembered, that, on the 26th day of November, A. D., 1838, Richard Raynal Keene, in person, filed the following petition, to wit:

To the Honorable the circuit court of the United States, for the ninth circuit and eastern district of Louisiana.

The petition of Richard Raynal Keene, Counsellor at law, a citizen of the State of Mississippi, respectfully sets forths.

That on the 14th day of September, A. D., 1807, your petitioner, for and in consideration of the sum of ten thousand dollars duly paid, purchased of the late Daniel Clarke, deceased, through his, said Clarke's, agent, Richard Relf, a tract or parcel of land, consisting of nine hundred and fifty-seven acres, (an authentic copy of which purchase is hereto annexed) situated upon the eastern bank of the bayou del Bosque Roxa or Red wood creek, at the distance of three miles and three quarters of a mile, in a N. N. West course from the confluence of said bayou or creek with the river Comite, near Baton Rouge in the district aforesaid. That said tract or parcel of land is part of a tract of thirty thousand acres or arpens of land sold or granted in or for the year 1804, by the Spanish intendant, Don Juan Ventura Morales, in the name or by the authority of the Spanish Government to Don Gilberty Andry, who was the vendor of said Clarke, as to the 957 acres aforesaid. That the said creek or bayou, in all its extension and the whole of said grant of 30,000 acres are situated in that part of Louisiana comprehended east and west, between the rivers Perdida and Mississippi, and north and south between the 31st degree of north latitude, and the Iberville and the island of Orleans; that is to say, the region comprehended within said limits has been claimed by the United States as part of Louisiana, who have alleged the nullity of all grants or sales of land made therein or within the same by Spain, since the date of the treaty of St. Ildefonso, of October, 1800, by which or in virtue whereof, the United States contend that Spain transferred to France all her right, title and interest in and to Louisiana. That in conformity with these pretensions, the United States caused sales to be made of said land, sold as aforesaid stated to your petitioner, and that Warren Whittaker, Laura Wade, R. W. Newport, George Dougherty, Francis Marks and C. Cunningham, who are all citizens of Louisiana, are now in possession of the premises, to wit: said 957 acres, which they claim under titles derived from the United States since said purchase made by your petitioner. That said Clarke made to your petitioner the sale aforesaid, with general warranty, and that he, your petitioner, has been evicted from said land by the aforesaid vendors of the United States. Whereupon your petitioner prays that said vendees of the United States be cited to appear and answer this petition, and that this honorable court adjudge, that in virtue of your petitioner's said purchase of and from said Daniel Clark, he, your petitioner, be held and considered as the true and only

proprietor of said land, and that he receive all further relief that may be just and legal in respect of the premises, &c.

(Signed) RICHARD R. KEENE.

Endorsed—Filed Nov. 26th, 1838.

(Signed) E. A. BRADFORD, *Deputy Clerk.*

Answer.

RICHARD R. KEENE
vs.
WHITTAKER & als.

The circuit court of the United States for the ninth circuit and the eastern district of Louisiana.

The defendants herein respectfully represent, that the plaintiff herein, R. R. Keene, has no valid title to the property sued for, for this reason, to wit: that the government of Spain, from which he pretends to derive title, had at the time of making the grant, which is the basis of his claim, as set out in his petitition, parted with all right and title to the section of country in which the land claimed is situated; that the said government never had any title to the same, subsequently to the treaty of St. Ildefonzo, of October 1st, 1800, by which she ceded the whole of Louisiana, of which the section of country in question lying between the Mississippi and the Perdida, the 31st degree of north latitude and the Gulf of Mexico and the island of New Orleans, formed part. Respondents further allege that their titles are derived from the Government of the United States, are good and valid, and they plead the general denial and pray to be hence dismissed with costs and for general relief.

(Signed) S. P. ANDREWS,
Attorney for Defendants.

Service is accepted and notice waived or admitted.

(Signed) S. P. ANDREWS,
Attorney for Defendants.

Endorsed—Filed Nov. 26th, 1838.

(Signed) E. A. BRADFORD,
Deputy Clerk.

Docket Entry.

MONDAY, November 26th, 1838.

R. R. KEENE
vs.
WHITTAKER, et als.

By consent of parties this cause was submitted to the court for judgment.

Judgment.

TUESDAY, November 27th, 1838.

R. R. KEENE
vs.
WHITTAKER, et al.

The court having maturely considered this case, do order, adjudge and decree, that judgment be entered for the defendant and against the plaintiff, and that they recover their costs to be taxed.

Statement of facts agreed upon by the parties to be sent up to the Supreme Court of the United States.

RICHARD RAYNAL KEENE
vs.
WARREN WHITTAKER, & als.

UNITED STATES CIRCUIT COURT,
For the 9th Judicial circuit and Eastern District of Louisiana.

The facts of this case as set forth in the record, and agreed upon by the parties to be sent up by writ of error to the Supreme Court of the United States for their adjudication, are as follows:

In the year 1804, a grant or sale of 30,000 arpens of land was made or consummated by Don Juan Ventura Morales, a Spanish intendant, in the name or under the authority of Spain, to Gilberta Andry. The whole of that land is situated in the section of country that is comprised within the 31st degree of north latitude, and the Iberville and the island of Orleans, north and south, and the rivers Perdida and Mississippi, east and west, and was sold by Andry to Daniel Clark. This land was laid off into 13 parcels or subdivisions; and on the 14th day of September, 1807, Clark, thro' his agent or attorney in fact, Richard Relf, for and in consideration of the sum of ten thousand dollars, the receipt whereof was duly acknowledged, sold by notarial act to Richard Raynal Keene the parcel or subdivision, No. 6, of the land referred to, consisting of nine hundred and fifty-seven acres, situated on the eastern bank of the bayou del Bosque Roxa or Redwood creek, near its confluence with the Comite, and gave to Keene a general warranty, or an absolute guaranty, for the same. Subsequently to Clark's sale to Keene, the United States took possession of the section of country before named, claiming it as part of Louisiana; and from them, the defendants in this suit, Warren Whittaker, Laura Wade, R. W. Newport, C. Cunningham, G. Dougherty, and Francis Marks, in different portions, as exhibited in an authen. diagram or plan of survey of the same, derive title to the subdivision No. 6 sold to Keene, and hold possession of it. The plaintiff, a citizen of Mississippi, brought his suit for the restitution of the land in question sold to him by Clark, resting his claim thereto on the Spanish title derived from Morales, whilst Spain exercised jurisdiction over the section of *of* country in which it is situated, and the defendants, citizens of Louisiana, resisted that claim on the ground that that section of country formed part of Louisiana, which Spain ceded to France in 1800, and France ceded to the United States in 1803.

We, the undersigned parties, agree that the preceding statement of facts shall go up to the Supreme Court of the United States, to be acted upon by them, for the affirmation or reversal of the judgment rendered in the premises by the circuit court aforesaid, on the twenty-seventh of November, eighteen hundred and thirty-eight.

(Signed) RICHARD RAYNAL KEENE.
S. P. ANDREWS,
Attorney for Defendants.

The following documents were filed in evidence on the trial.

Know all men by these presents, that I, Richard Relf, of the city of New Orleans, as the agent and attorney of Daniel Clark, Esq., for and in consideration of the sum of ten thousand dollars, to me in hand paid, the receipt whereof I hereby acknowledge, have sold and conveyed, and by these presents do sell and convey unto Richard Raynal Keene, of said city, counsellor at law and major of the 2d battalion of the 2d regiment of Orleans militia, a certain tract or parcel of land consisting of nine hundred and fifty-seven acres, situated upon the bayou Arroya del Bosque Roxa, within or about two leagues from the port of Baton Rouge, to be and remain for the sole and proper use and enjoyment and possession of him, the said R. R. Keene, his heirs and assigns forever; I the said vendor, in the name of him the said Daniel Clark, hereby guarantying to him the said vendor, his heirs and assigns forever, full complete and absolute dominion, property, and title in and to the said tract or parcel of land, together with all its benefits and advantages.

Given under my hand this 14th September, A. D. 1807.

(Signed) RICHARD RELF,
Attorney of Daniel Clark.

Jn. Bapts. Ramirez,
Joaq'n Lorano,
Pierre Pedesclaux, *N're.*

I, Louis T. Caire, notary public in and for the city and parish of New Orleans, duly commissioned and sworn, do hereby certify that the foregoing is a faithful copy of the original act, extant in my register, according to the laws and usages of this State. In faith whereof I grant these presents under my signature, and the impress of my seal of office, on the third day of August, eighteen hundred and thirty-seven.

(Signed) LOUIS T. CAIRE.

[For plats see original, page 9.]

State of Louisiana,
Parish of East Feliciana.

The above connected plats represent the locality of a tract of land claimed by Col. Richard R. Keene, of New Orleans, originally surveyed for Dn. Gilbert Andry, and containing, by the original survey, nine hundred and fifty-seven arpens. The northern or upper boundary not having yet been identified, I have drawn the diagram at the distance of the original plat, and make the estimate of the quantity accordingly. The

conflictions with the surveys of the United States are accurately laid down, but having no reference to the actual quantities in each subdivision of sections, as well as of other claims, the quantities included respectively in the claim of Col. Keene are omitted. The lines have not been remarked by me.

Given under my hand this 14th September, 1838.

(Signed) GEO. DOUGHERTY,
Parish Surveyor of East Feliciana, La.

Endorsed—Filed November 26, 1838.

(Signed) E. A. BRADFORD, *Deputy clerk.*

UNITED STATES OF AMERICA, *State of Louisiana.*

By Edward D. White, Governor of the State of Louisiana.

These are to certify that Geo. Dougherty, whose name is subscribed to the instrument of writing herein annexed, is now and was at the time of signing the same parish surveyor, in and for the parish of East Feliciana; that his signature is genuine, and that all his official acts, as such, are entitled to full faith and credit.

Given at New Orleans, under my hand, and the seal of the State, this eighteenth day of September, one thousand eight hundred and [SEAL.] thirty-eight, and of the independence of the United States the sixty-third.

(Signed) E. D. WHITE.

By the Governor.

(Signed) WM. C. C. CLAIBORNE,
Secretary of State.

"Don Viente Pintado capitan de cavalina de milicios y segundo agrimensor de esta provincia de la Louisiana, &c., certifico, que fueron medidas y lindados á favor del Señor Don Gilberta Andry, treinta mil arpanes de tierra en la jurisdiccion de Baton Rouge; medidas á la percha de Paris de dies y ach's présde lineales de la minsure cuidad, segun costumbre agraria en esta provincia y en trere terrenos ó piezas de tierras distentas segun los plaves anexos cuya superficie de eada una en particular, situation y linduos corno sique."

No. 6. "Nueve cintos cinquenta y siete arpanes en la margen oriental del preferida Arroya del Bosque Roxa. Harienda fr ente á el, y a tres millos y tres quartas al N. N. Oe de la agusa de su confluencia con el Comite lindando e la paste boxal con tierras de Juan Batista Leonard por la austral y oriental con tierras del interesada y por la Occidental con el antedicho Arroya del Bosque Roxa."

STATE OF LOUISIANA, *City of New Orleans.*

The foregoing two paragraphs in the Spanish language I hereby certify to be an exact copy from the document exhibited to me, the undersigned

notary public this day, by the deputy register of wills, in the probate court, in and for the city and parish of Orleans, in the State of Louisiana, in which said office, said document, with many others, were by said deputy register alleged to have been severally deposited by Richard Relf, as appertaining to the succession of Daniel Clark; and I further certify that said documents have the authentication and signature of Carlos Friedreau as surveyor general, of the date of February the fourteenth, eighteen hundred and four.

In testimony whereof I grant these presents at New Orleans this 23d day of November, 1838.

(Signed) W. T. LOUIS, *Notary Public.*

We, the undersigned counsel in the case of R. R. Keene *vs.* Whittaker and als., now pending in the U. S. circuit court for the ninth circuit and eastern district of Louisiana, acknowledge that the above described land is precisely the same mentioned in said suit, and that this document is to be filed with or in said suit.

(Signed) S. P. ANDREWS, *Att'y for Def't.*
R. R. KEENE, *P. P.*

NEW ORLEANS, Nov. 23, 1838.

TRANSLATION.

"Don Vicente Pintado, captain of cavalry in the militia, and second surveyor of this province *province* of Louisiana, &c., certify that thirty thousand acres or arpens of land, within the jurisdiction of Baton Rouge, were measured and laid off in favor of Don Gilberto Andry, according to the agrarian measure of Paris of 18 feet to the perch, which (the 30,000 arpens) were subdivided into 13 distinct tracts or parcels, according to the plans hereunto annexed; the situation, extent and boundaries of each of said parcels being given."

No. 6. Nine hundred and fifty-seven arpens on the east bank of the bayou del Bosque Roxa, or Red Wood Creek, fronting on the same at the distance of $3\frac{3}{4}$ miles in a N. N. W. course by the compass, from its confluence with the Comite, being bounded on the north by land of John Baptiste Leonard, on the south and east by the land of the party thus certifying, (Pintado) and on the west by the aforesaid bayou del Bosque Roxa."

STATE OF LOUISIANA, *First Judicial District Court.*

Be it remembered that on the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and thirty-four, into the district court, in and for the first judicial district of the State of Louisiana, came Richard Keene in propria persona, and filed the following petition: to wit:

To the Honorable Judge of the first judicial district court of the State of Louisiana—The petition of Richard Raynal Keene, counsellor at law, of the city of New Orleans, respectfully sets forth:

That Daniel Clark, late of said city, deceased, through his agent or attorney, Richard Relf, in the month of September, A. D. 1807, that is to say, one thousand eight hundred and seven, for and in consideration of the sum of ten thousand dollars, bargained and sold to your petitioner a certain tract or parcel of land situated upon the Bayou del Bosque Roxa or Red wood creek, near Baton Rouge, between the Perdida and Mississippi, east and west, and the thirty-first degree of north latitude and the Iberville, north and south, to have and to hold unto your petitioner the said land, and to his heirs and assigns for ever. That said Clark derived his title to said land from or through a grant of the same, by or from the Spanish government, after the date of the treaty of San Ildefonzo, in the year 1800, by virtue of which the district of country included within the limits aforesaid, as part of the then province of Louisiana, was ceded by Spain to France. That France afterwards, to wit: in the year 1803, (the same in which the title aforesaid of said Clark was derived from the Spanish government) ceded and transferred Louisiana to the United States, including the district aforesaid. That the United States thereby became justly entitled to all the public land or lands not sold or ceded by Spain, in Louisiana, before said treaty of St. Ildefonso. That in virtue of said just title the United States actually declared themselves, by different acts of Congress, to be entitled to, and took possession of, all such public land, among which was the land sold as aforesaid to your petitioner. That the accompanying documents marked 1 and 2 serve to prove the said sale to your petitioner of said land, and the occupation or possession thereof on the part of the United States. That your petitioner of course is entitled to the devolution or reimbursement of said purchase money, amounting to ten thousand dollars, together with the damages of five per cent. per annnum upon the same, since the date of said sale made to your petitioner by said Clark. That said Clark's estate has been inherited by and belongs to Eleanor O. Bearn, Tom Green, Sarah Campbell and Caroline Clark, all residing in foreign parts, or without the State of Louisiana. That said persons so inheriting and holding said estate, ought of right to make to your petitioner the devolution or reimbursement of said purchase money, together with said damages.

Therefore your petitioner prays that said persons so inheriting and holding said estate in manner aforesaid, or their representative or agent, be cited to appear and answer this petition, and after due proceeding, be adjudged to pay your petitioner the aggregate sum of said purchase money and damages, together with all such other relief as may be just and proper. And your petitioner, &c.

(Signed) RICHARD RAYNAL KEENE, *P.P.*

Copy of Agreement.

R. R. KEENE, *appt.*,
vs.
The heirs of DANIEL CLARK, *app'ees.*

SUPREME COURT,
State of Louisiana.

It is agreed and understood that the premises sold to the appellant by said Clark form part of a grant of thirty thousand arpens made by the Spanish Intendant Morales to Don Gilberto Andry in 1804.

(Signed) RICHARD RAYNAL KEENE,
(Signed) L. C. DUNCAN, *for defts.*

On the back of the above document is written as follows: 2,720, R. R. Keene *vs.* Heirs of Clark. Agreement. Supreme Court. Filed April 20th, 1835. A. Cuvillier, D. C.

SUPREME COURT OF THE STATE OF LOUISIANA.

I hereby certify the foregoing three pages to contain a true extract from the transcript of appeal in the case of Richard R. Keene vs. The heirs of Daniel Clark, which appeal is on the files of this court under No. 2,720, and also a true copy of the original agreement filed in this court on said appeal.

In testimony whereof, I hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this 22d day of November, in the year of our Lord 1838, and the 63d of the Independence of the United States of America.

(Signed) A. CUVILLIER, *Clk.*

Endorsed—Filed Nov. 26th, 1838.

(Signed) E. A. BRADFORD, *Dy. Clk.*

Petition for writ of Error.

RICHARD R. KEENE
vs.
WARREN C. WHITTAKER, &c.

UNITED STATES CIRCUIT COURT,
For the Ninth Circuit and Eastern District of Louisiana.

The aforesaid plaintiff being advised that there is error in the judgment rendered in said case by the Hon. P. K. Lawrence, therefore prays said honorable judge to allow a writ of error for carrying up the record of said case to the Supreme Court of the United States, for the purpose of having said judgment revised.

(Signed) R. R. KEENE.

Be it so, the plaintiff giving bond as required by law, with security in the sum of two hundred and fifty dollars.

(Signed) P. K. LAWRENCE, *U. S. Judge.*

Endorsed—Filed June 25th, 1839.

(Signed) HENNEN, *Clk.*

Bond for writ of Error.

Know all men by these presents, that we, Richard Raynal Keene and C. A. Warfield, are held and firmly bound unto Warren Whittaker, Laura Wade, R. W. Newport, George Dougherty, Francis Marks and C. Cunningham, in the sum of two hundred and fifty dollars, to be paid to Warren Whittaker, Laura Wade, R. W. Newport, George Dougherty, Francis Marks and C. Cunningham, their several executors or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly, by these presents, sealed with our seals, and dated this 16th day of July, A. D. 1839.

Whereas, the above named Richard R. Keene hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit lately depending and decided in the circuit court of the United States for the 9th circuit, holding sessions in and for the eastern district of Louisiana, wherein said Richard Raynal Keene appeared as plaintiff, and said Whittaker, Wade, Newport, Dougherty, Marks and Cunningham, as defendants.

Now, therefore, the condition of this obligation is such, that if the above named Richard Raynal Keene shall prosecute his said writ of error to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be null and void; otherwise the same shall reman in full force and virtue.

(Signed) R. R. KEENE, [L. S.]

(Signed) C. A. WARFIELD. [L. S.]

Sealed and delivered in presence of

(Signed) PHILIP LAFONTA.

Acknowledgment of Service.

UNITED STATES CIRCUIT COURT,
For the Ninth Circuit and Eastern District of Louisiana.

I, the undersigned, Warren C. Whittaker, a defendant in said case, acknowledge the service of citation under the writ of error obtained by said plaintiff, for carrying up said case to the Supreme Court of the United States.

(Signed) W. C. WHITAKER.

Endorsed—Filed June 25, 1839.

June 25th, 1839. HENNEN, *Clerk.*

CLERK'S OFFICE, CIRCUIT COURT OF THE UNITED STATES,
Ninth Judicial Circuit and Eastern District of Louisiana.

I, Duncan N. Hennen, clerk of the said court, do hereby certify that

the foregoing twenty-one pages of writing contains a full and complete transcript of the record of the pleadings, process, evidence, proceedings and other matters relating to the suit of Richard Raynal Keene *vs.* Warren Whittaker and others, in this court, so fully as the same appears from the records of the court in my office.

Witness my hand and the seal of the court, at the city of New Orleans, this fifth day of August, in the year of our Lord one thousand [SEAL.] eight hundred and thirty-nine, and of the Independence of the United States, the sixty-fourth.

(Signed) DUNCAN N. HENNEN, *Clk.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the Judges of the Circuit Court of the United States, ninth Judicial Circuit and Eastern District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court before you or some of you, between Richard Raynal Keene, plaintiff, and Warren Whittaker, Laura Wade, R. W. Newport, George Dougherty, Francis Marks, and C. Cunningham, defendants, a manifest error hath happened to the great damage of the said Richard R. Keene, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the second Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law and customs of the United States should be done.

Witness, the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, the second Monday of January, in [SEAL.] the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-third.

DUNCAN N. HENNEN, *Clk.*

THE UNITED STATES OF AMERICA.

To Laura Wade, R. W. Newport, George Dougherty, Francis Marks, and C. Cunningham, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of January next, pursuant to a writ of error, filed in the clerk's

office of the Circuit Court of the United States, Ninth Judicial Circuit and Eastern District of Louisiana, wherein Richard Raynal Keene is plaintiff in error, and Warren Whittaker and yourselves are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Roger B. Taney, Chief Justice of the Supreme [SEAL.] Court of the United States, this seventeenth day of July, in the year of our Lord one thousand eight hundred and thirty-nine.

P. K. LAWRENCE, *U. S. Judge.*

Rec'd, 5th August, 1839.

Served, 16th August, 1839, for Laura Wade, at her residence, to a free white person, apparently above the age of 14 years. Distance from New Orleans, 155 miles.

Served, 16th August, 1839, on George Dougherty, at his residence, to a free white person, apparently above the age of 14 years. Distance from New Orleans, 155 miles.

Served, 16th August, 1839, on R. W. Newport, personally, at his residence. Distance from New Orleans, 155 miles.

Served, 17th August, 1839, on Francis Marks, personally, at his residence. Distance from New Orleans, 155 miles.

C. Cunningham not to be found. Distance gone to serve, 155 miles from New Orleans.

D. ALLAIN, *U. S. Deputy Marshal.*

Service of the within citation of appeal acknowledged.

S. P. ANDREWS, *Atty. of Record for Defendants.*

RICHARD RAYNAL KEENE
vs.
WHITTAKER, et al.
} Appellant's Brief.

This case presents the same points as those of Lee *vs.* Garcia, 12 Peters, p. 511; and Foster and Elam *vs.* Neilson, 2 Peters, p. 254.

It is supposed that the Court will see no reason for changing its opinion; the case, nevertheless, is respectfully submitted. A statement of the facts of the case will be found at page 5 of the Record.

SUPREME COURT OF THE UNITED STATES.

No. 52.

JAMES TAYLOR, APPELLANT,

vs.

NICHOLAS LONGWORTH AND THOMAS D. CARNEAL.

[ON APPEAL FROM THE CIRCUIT COURT U. S. FOR OHIO.

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Langtree & O'Sullivan Print.

THE UNITED STATES OF AMERICA, *District of Ohio, sct.*

At a circuit court of the United States of America, within and for the seventh circuit and district of Ohio, begun and held at the court house, in the city of Columbus, in the district aforesaid, before the honorable John McLean, and the honorable Humphrey H. Leavitt, judges of said court, on the first Monday in the month of July, being the first day of July, in the year of our Lord one thousand eight hundred and thirty-nine. Among other proceedings had were the following, to wit:

NICHOLAS LONGWORTH, *Compl't*,
vs.
JAMES TAYLOR, *Resp't*. } In chancery.

Be it remembered, that heretofore, to wit, on the eleventh day of June, being in the June term of said court, in the year of our Lord one thousand eight hundred and twenty-five, came into court here the said Nicholas Longworth, complainant herein, in his own proper person, and filed his bill of complaint against the said James Taylor, respondent, which said bill of complaint is in the words and of the tenor following, to wit:

Bill.

"To the honorable the judges of the circuit court of the United States, sitting within the seventh circuit, in the State of Ohio, the petition of Nicholas Longworth respectfully showeth, that on or about the day of , in the year of our Lord 1815, or near that year, your orator purchased of one James Taylor, of Newport, in the State of Kentucky, (your orator being a resident of Cincinnati, in the State of Ohio) by and through the authorized agent of the said James Taylor, one James T. Eubank, since deceased, a part of lot No. 81, in Cincinnati, beginning at the S. W. corner of said lot, on Main street, thence northwardly, on Main street, fifty-nine feet, and the same width back at right angles, half the depth of the lot, supposed to be one hundred feet, for which your orator was to pay the sum of one hundred and twenty-five dollars per foot in front, and to pay the one-third thereof on signing the written contract, then executed in due form of law, by and between your orator and the said James Taylor, by his authorized agent aforesaid, and the remaining two-thirds in two equal instalments; said instalments were without interest. Your orator cannot now state the date of said contract, nor the periods of payment with certainty, as he recently forwarded a bill of injunction for allowance to the Hon. C. W. Byrd, Esq., with the written contract annexed, by a special agent, who went to the town of West Union under the impression that the hon. judge there resided, and on his arrival at West Union, instead of continuing until he found the said C. W. Byrd, Esq., put the letter in the post office, which enclosed the bill and contract, at said West Union, to be forwarded to the said C. W. Byrd, Esquire.

On the return of said messenger, your orator despatched a second messenger to the hon. judge, who returned a few hours since with information that said letter had not reached him. But said remaining two-thirds were either due in 6 and 12 months, or one and two years from the date of said contract; and your orator accordingly, on the execution of said contract, paid the one-third the consideration money, which was entered as a credit on the back of said contract.

And your orator further alleges, that the said lot, when bought by him, was in a low, sunken, swampy situation, and that at great expense he filled up the said lot so as to make it fit for building, and then erected thereon four store rooms, which, at the high price of materials and workmanship at the time, cost him, if his recollection of the bills be correct, (and he thinks he is so,) three thousand dollars, besides the cost of some back buildings and repairs since, which cost your orator upwards of one thousand dollars more.

And your orator further states, that said instalments becoming due and unpaid by your orator to the said James Taylor, your orator commenced the payment of interest on said balance, to the said James Taylor, as the same became due, and after some time the said James required that your orator should pay him either nine or ten per cent. per annum for continued indulgence, which your orator cannot from recollection say positively, and pay the same quarterly; and your orator continued to pay the same for a long period of time, and up to the time of the adverse title being set up hereafter referred to. Your orator does not set up the allegation of said illegal interest being paid, with a view to claim any ungentlemanly advantage therefrom; on the contrary thereof, he voluntarily agreed to pay the same, is satisfied therewith, and only states it as a reason why the balance of said purchase money was not paid or demanded by said James, and is one of the reasons why he cannot now make time a material part of the contract, thereby to avoid a specific execution, if it shall appear he has a title to the premises.

And your orator further states, that he, some time after his purchase, sold a part of said premises. And your orator continued to pay the said James said agreed interest quarterly, or as nearly so as convenience would admit, until the latter part of 1819, or the forepart of the year 1820 or 1821; the precise time your orator cannot state, nor the amount of the last payment made, as there was a good understanding between your orator and the said James, and it was sometimes paid to the black boy of the said James, who could give no receipt, not being able to write, and other times to the agent of the said James, and no receipt taken. Your orator particularly remembers a payment to a Mr. Barry, now deceased, of two hundred dollars, a relation and agent of the said James, for which he has no order or receipt; but he presumes the books of the said James will show the several payments.

And your orator further states, that about the year 1820, the said James stood indebted to the F. & M. Bank, of Cinc., in a large amount,

then there due him by your orator; and your orator wrote to the said James, who was then at the eastward, proposing to pay said balance then due him, to his credit in said bank. Your orator received for answer, that said tender would not suit the said James, as the paper of the said bank was below par, but that any arrangement your orator would make to meet or discharge a debt due by him to the Bank of the United States would answer his purpose, as they might call on him. Your orator accordingly called on the agent of the Bank of the United States, learnt what time would be given, and sold the part of the same premises, unsold, to one David Griffin, at a sacrifice, payable in several equal annual instalments, with interest yearly, the said Griffin being one of those men whose punctuality could be relied on; and your orator gave that time at his own suggestion, finding it would meet the demands that would be made on the said James by said Bank of the United States. Your orator having closed said bargain, went to Kentucky and informed the said James of the same, when the said James refused the arrangement. Your orator considering himself deceived by the said James, and treated improperly, after the assurances given, made use of some words expressive of his impressions, and words of heat and passion followed. Shortly after this time, one Stephen Burrows informed your orator, as purchaser under the said James, and as your orator understood, to charge him with notice that there was a better title to said lot No. 81 than said James', in one Chambers and wife, and that he was about to have the same put in suit, as soon as he could collect the facts and evidence. The said James, sometime thereafter, brought an action of ejectment against your orator in your hon. court, to eject your orator, or rather the tenants of those claiming under him, from the premises, which your orator considered unjust and unreasonable, so long as a cloud rested on the title of the said James, which premises your orator had bought from him under assurances that the same was clear and indisputable; and that he could make your orator an unincumbered title, free from litigation, was your orator's inducement to the purchase. Your orator nevertheless proposed to the said James, to avoid litigation, to pay the costs that had accrued on said ejectment—say one thousand dollars in hand, and one thousand dollars per year till the balance due him was discharged—without waiting the decision on the title of the said James, and risk the responsibility of the said James to repay him for money paid, improvements, interest, &c., in case of a failure of title, which proposition the said James refused. This refusal your orator considered the more unreasonable, as the said Griffin, when he learnt the said James had refused to confirm the arrangement made by your orator with him, proposed to pay the money in hand to your orator, to pay the said James, and would have done it had he not learnt immediately thereafter of said dispute in the title, and has in consequence of said dispute, paid your orator nothing on said contract, in consequence of said dispute of title, altho' a large sum is now due; nor did your orator deem he could legally or equitably demand the same.

And your orator further charges, that finding he could get the Bank of the United States to take in Griffin's note, and give the said Taylor a credit for the balance due him by your orator, your orator proposed to obtain him a credit for the amount in said bank, which the said James also refused. This was before the bill in chancery hereafter set forth (which is now pending) to divest the said James of his title was filed.

And your orator further alleges that a bill has been sometime pending in one of the State courts in this county, by Chambers and wife, against the said James and your orator, to recover the said lot, and which bill the said James has not yet answered, although it has been long pending, but is now, as your orator is advised, about to make a motion, after great delays, to move the same to your hon. court.

And your orator further charges, that on being informed by said Burrows of said intended suit, he called on the counsel of said Chambers and wife, and asked him what were his candid impressions on said subject—whether the said Chambers and wife had the better title or not, or whether your orator would be safe in paying said Taylor the balance due him pending said Chambers' claim. The application being confidential, and the person the particular friend of your orator, he knew he would give his opinion candidly. Your orator was advised by said counsel, he had no doubt of success, and that your orator would be unsafe in paying the balance of consideration money.

And your orator further charges, that anxious if possible to lead to some amicable arrangement, he, some months since, called on the said James, and requested a statement of the balance claimed by him, telling the said James, that for some payments he had no receipts, and depended on his honor; but the said James refused to make any statements, or inform your orator of the balance claimed by him. Your orator then called on D. K. Este, Esq., the att'y of the said James, told him of his application and its refusal, and required him to furnish the account of the balance claimed, and requested him to endeavor to obtain the same from the said James, but has to this hour been unable to obtain it.

Your orator further alleges, that the said James, at the last term of your hon. court, obtained a judgment in said action of ejectment, your orator having no remedy at law, and has taken out his writ of possession to eject the tenants of those holding under your orator from the buildings, &c., erected by your orator at great expense.

And your orator further alleges, that he recently proposed to the attorney of the said James, rather than be driven to his bill in chancery, he would endeavor, if the said James would wait a few days, to make arrangements to pay the balance due, and depend on the ability of the said James, in case of a failure of title—so much was your orator averse to litigation; but the att'y informed your orator he did not believe the said James would receive the money, and after seeing the said James, he informed your orator he refused all terms, but insisted on possession under his ejectment. Your orator had also,

previous to said last proposition, proposed to pay one or two thousand dollars in hand, and one thousand dollars yearly until the claim of said Chambers was decided, and as soon as the same was settled, that he would pay the whole balance due. This was in like manner refused—and your orator prays the said James Taylor may be made defendant to this his bill.

All of which actings and doings of the said James Taylor are contrary to equity and good conscience, and greatly tend to the injury of your orator. In tender consideration whereof, as your orator has no remedy at law, he prays the aid, benefit and interference of your hon. court, where matters of this nature are properly cognizable. To the end, therefore, that the said James Taylor, and his confederates, when discovered, may full, true and perfect answers make to all and singular the several allegations of this bill, and that in as full and ample a manner as if he were specifically interrogated thereto. And that he may with like precision declare what were the terms of said contract, what the amount paid in hand, and entered on the back of said contract; what each and every subsequent payment, made on said acc.; whether said James has not a statement of the same on his books, or some other memorandums thereof, and if so that he produce them, or a copy thereof; whether he does not remember, among the last of the payments, a sum of two hundred dollars paid his relation, Mr. Barry; whether his servant, Reuben, and others, did not sometimes get money by his directions; whether your orator did not agree with him to allow him unusual interest, and pay the same quarterly for indulgence; how long said contract existed; when made; what the per cent. was; how much it amounted to quarterly, and how much the gross amount; whether your orator did not write to him in 1820, or thereabouts, at the eastward, in substance as stated;—if not, to what purport; whether his answer was not as stated;—if not, to what purport; and what his impression and belief, where his memory does not certainly serve him; whether your orator did not make the several proffers of accommodation aforesaid, and risk his responsibility for a repayment; whether your orator did not require a statement of the bal. due in the court of com. pl's of this county or elsewhere, some months since, stating as af'd alleged, and whether he did not refuse to furnish a statement of the amount claimed; whether he has not recently said he would not even take the balance due, and guarantee the title; whether the title to be made by contract was not one of general warrantee; and your orator expressly charges such to have been the fact, with a special answer to every other written thing set forth. And your orator prays, on a final hearing, if it shall appear that the said property is not in the said James, and that he cannot make your orator a valid title for the same, that he may be compelled to repay your orator all the moneys paid him, with interest from the time of payment; all moneys paid for improvements, with interest thereon from the time of expenditure; taxes, and other incidental expenses, after deducting therefrom a reasonable compensation for the use of said

ground, from the time of purchase, which would leave the said James in your orator's debt in a larger sum by far than the balance now due him, and more than your orator believes the premises would now command in money; and was your orator under no contracts he would prefer the abandonment of the contract to its specific performance, as most advantageous. But should it appear the said James can make a valid title in pursuance of his contract, your orator prays a specific execution of the same on such terms and times as to your honors shall seem equitable, to enable your orator to comply with his engagements, and compel the said James to do what in equity and good conscience he is bound to do.

May it please your honors to grant to your orator a writ of injunction, enjoining the said James Taylor, his agents, attorneys, the marshal, his deputies, and all others, from further proceedings in said ejectment, or the eviction of the tenants, till you further order thereon; and your orator prays said injunction may continue till the final hearing, when, if it shall appear that the said James has a valid title, he prays a decree for a title; but, if it shall appear he can make no title to your orator, that your orator may be decreed to render up the premises on the receipt of the sum that shall be due your orator on settlement, and not before such other and further relief as on trial may seem just and equitable; and your orator, as in duty bound, &c.

May it please your honors to grant your orator the writ of subpœna, &c., directed, &c., and your orator, as in duty bound, will ever pray, &c.

THE STATE OF OHIO, CITY OF CINCINNATI, }
County of Hamilton. }

Personally appeared before me, the undersigned, Nicholas Longworth, of lawful age, and being duly sworn, deposeth and saith, that the facts in this bill contained are true, so far as he states of his own knowledge, and so far as he relies on the information of others, and states therefrom, he believes them to be true, &c.

N. LONGWORTH.

Sworn to, and subscribed before me, Sept. 6, 1824. In testimony whereof I have hereunto subscribed my name, and affixed the seal of the city of Cincinnati, the day and year aforesaid.

ISAAC G. BURNET, *Mayor*. [L. S.]

Continuance.

And thereupon this cause was continued.

And afterwards, to wit, on the twenty-third day of July, in the year of our Lord one thousand eight hundred and twenty-five, aforesaid, a certain writ of subpœna in chancery issued from the clerk's office of said court, in the words and figures following, to wit:

Subpœna.

"THE UNITED STATES OF AMERICA, *District of Ohio, sct.*

To the Marshal of said District, greeting:

We command you to summon James Taylor, a citizen of and resident in the State of Kentucky, if he be found in your bailiwick, to appear before the judges of the circuit court of the United States for the 7th circuit and district of Ohio, aforesaid, at Columbus, on the first Monday in the month of January next, to answer Nicholas Longworth, a citizen of and resident in the State of Ohio, of a certain bill in chancery against him, by the said Nicholas Longworth, exhibited; and this he shall in no wise omit, under the penalty of the law; and have then there this writ.

Witness, the Honorable John Marshall, Chief Justice of the United States, this 23d day of July, 1825, and in the 50th year of the Independence of the United States of America.

Attest: WM. KEY BOND, *Clerk.*" [L. S.]

And afterwards, to wit, on the fifteenth day of February, in the year of our Lord one thousand eight hundred and twenty-six, the following *alias* writ of subpœna issued from the clerk's office aforesaid, to wit:

Alias Subpœna.

"THE UNITED STATES OF AMERICA, *District of Ohio, sct.*

To the Marshal of said District, greeting:

We again command you to summon James Taylor, a citizen of and resident in the State of Kentucky, if he be found in your bailiwick, to appear before the judges of the Circuit Court of the United States for the 7th circuit and district of Ohio, aforesaid, at Columbus, on the first Monday in the month of June next, to answer Nicholas Longworth, a citizen of and resident in the State of Ohio, of a certain bill in chancery against him by the said Nicholas Longworth exhibited; and this he shall in no wise omit, under the penalty of the law: and have then there this writ.

Witness the Honorable John Marshall, Chief Justice of the United States, this 15th day of February, 1826, and in the 50th year of the Independence of the United States of America.

Attest: WM. KEY BOND, *Clerk.*" [L. S.]

Which said writ was afterwards, to wit, at the time to which the same was made returnable, returned into court here, by the marshal, to whom the same was in form aforesaid directed, with his return endorsed thereon, as follows, to wit:

Return.

"Served May 3d, 1826, by giving to the defendant, James Taylor, a copy of this writ, together with a copy of the bill, &c.

WM. DOHERTY, *Marshal.*"

Continuance.

And thereupon this cause was continued.

Rule for Answer.

And afterwards, to wit, at rules held in the clerk's office of said court, in the month of August, in the year of our Lord one thousand eight hundred and twenty-six, aforesaid, came the said complainant, and entered a rule against the said respondent to answer the said bill of complaint within ninety days, or a decree *pro confesso* would be thereupon entered against him, according to the rules of said court.

Decree pro confesso.

And afterwards, to wit, at the expiration of the time in which the said respondent was ruled to answer as aforesaid, to wit, at rules held in the clerk's office of said court, in the month of November, in the year last aforesaid, came the said complainant; and the said respondent having failed to answer, as ruled to do, a decree *pro confesso* was thereupon entered against him, according to the rules of said court. And this cause was continued.

Decree set aside, and Answer filed.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, to wit, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and twenty-six, "on motion of the defendant, by his attorney, the decree *pro confesso* entered in this cause is set aside, his answer filed, and cause remanded to rules." Which said answer is in the words and figures following, to wit:

"To the Honorable the Judge of the Circuit Court of the United States, Seventh Circuit, District of Ohio, in Chancery sitting—

The answer of James Taylor to the bill of complaint of Nicholas Longworth, in this court exhibited against him.

This respondent, saving to himself all just exceptions to the many errors and insufficiencies in said bill contained, for answer to so much thereof as he is advised is material for him to answer to, he answers and says: That on the fifth day of April, 1814, one James T. Eubank, the agent of this respondent, made a contract with the complainant to sell him a part of the lot in said bill described—that is, part of lot number eighty-one, on Main street, supposed to contain about fifty-

nine feet five inches, on Main street, at one hundred and twenty-five dollars per front foot; to be paid one third in hand, one third in six months, and one third in twelve months; a deed of warranty to be made to Longworth in three months, on a mortgage to secure the payments. The purchase money upon the ground sold was estimated at seven thousand four hundred six dollars twenty-five cents; of which, twenty-four hundred fifty-eight dollars thirty-three cents, was paid in hand, and the complainant put in immediate possession of the said lot. This respondent admits that when the second payment became due, said Longworth proposed that if your respondent would not press the payment, he would pay to him the same amount of annual interest as was received for dividends upon stock in the Miami bank; and this respondent admits that interest was received by him at that rate upon the second and third instalments, up to the 31st of Dec. 1817.

And this respondent, further answering, states that the amount paid to him at different times upon said contract, besides the payment first made of $2,458 33, to the best of this respondent's recollection, and according to such accounts as he has in his hands, is as below stated; a large portion of which was in currency, the value of which was not more than 66 cents in the dollar.

1815.		
July 5th.	By this sum received on account of interest, as agreed on, up to this date, on the debt due on your contract with J. T. Eubank, for the sale of part of lot No. 81, in Cincinnati	$303 40
	Interest was paid me on the debt up to 31st December, 1817, sum not recollected.	
1818.		
April.	By this sum paid me by Josiah Herbert, for you, on account of interest on the said debt	100 00
Sept. 30.	This sum paid to George Swan for me, on account of interest on said debt - - -	81 00
1819.		
July 21.	By this sum paid P. H. Jones for me, on account of interest on said debt - - - - -	150 00
Aug. 18.	By paid me in Piatt's notes, on account of interest on said debt - - - - -	100 00
Sept. 2d.	By do. do. do. on account of interest on same, $95; do. in Farmers and Mechanics Bank of Chillicothe, and Cincinnati Corporation tickets, $25—making - - - - -	120 00
		$854 40

This respondent, further answering, states that the said Longworth wholly neglected and refused, from the year 1819 up to the month of September, in the year 1822, to make any payments upon account of said contract, being at the same time in receipt of a large income from the property. Your respondent commenced an ejectment to the

September term of this court, in the said year 1822, to compel the said Longworth to complete said contract, or to put an end to it. This respondent admits that, pending said ejectment, he understood from his counsel, that said Longworth made several propositions to make a new contract for the payment of the balance due upon the old contract of purchase, which this respondent refused to make; but at all times declared his readiness to accept the balance of purchase money and interest, and make a conveyance. This respondent states that at July term of this court, in the year 1824, he obtained judgment upon the ejectment, and in August following obtained possession, under a writ of habere facias possessionem, from this court. This respondent admits that, some time in the year 1823, one Chambers and wife set up an equitable claim to said lot, and commenced a suit in chancery thereon, in the month of November of that year; but your orator alleges that he had been in peaceable possession of said lot from the year 1793, and had held the same from that time, for which he obtained a deed from John Cleves Symmes, in the year 1798; so that his possession alone rendered his title complete against the claim of said Chambers and wife; and the claim aforesaid could afford no colourable pretext for the said Longworth to neglect complying with his contract.

This respondent, further answering, denies that the said Longworth made improvements on the said lot, of the value set forth in said bill. This respondent admits that Longworth erected buildings thereon, but they were and are of a very cheap kind; and this respondent insists that if an account were taken of improvements and payments, and of rents and profits, said Longworth would be indebted to your orator. But this respondent insists that said Longworth, having wholly omitted and neglected to comply with his contract for a number of years, and when your respondent brought an ejectment to disaffirm the same, continued still to neglect a performance, until your orator was put in possession, and then taking no steps for a period of about twenty-four months to complete said contract, cannot now come into equity to set up said contract, the more especially as no offer is yet made to perform said contract. And this respondent further insists, that a court of equity cannot direct an account of purchase money paid, improvements made, and rents and profits received, under a contract which has been put an end to, by the refusal of the party to comply with it who seek such an account.

This respondent, having answered all that he is advised it is material for him to answer in said bill, denies all fraud and unlawful combination, and prays to be hence dismissed with his costs and charges, &c.

ESTE & HAMMOND, *for Respondent.*

UNITED STATES 7TH CIRCUIT COURT, OHIO DISTRICT.

The said James Taylor appears in open court, and, being duly sworn, says that the said answer, as before set forth, contains the truth.

JAMES TAYLOR.

Sworn to and subscribed in open court, Dec. 26, 1826.
Attest: WM. KEY BOND, *Clerk*.

Exhibit.

"Memorandum of an agreement between Gen. James Taylor of the one part, by his agent, James T. Eubank, and Nicholas Longworth, of the other.

Said Taylor has sold the said Longworth a part of his lot on the east side of Main street, in Cincinnati, and north of the lot occupied by Harman Long. The number of the lot, on the plat of the town, is eighty-one. The part now sold commences at a point on Main street, forty feet from the northwest corner of the lot; thence southwardly, on Main street, to the southwest corner of the lot, supposed to be about fifty-nine feet; thence eastwardly, on the line of the lot, one half its depth, supposed to be ninety-nine feet; thence northwardly, on a line parallel to Main street, to within forty feet of the northern boundaries; thence westwardly, on a line parallel to the southern boundary of the lot, to Main street, to the beginning corner. The price is one hundred and twenty-five dollars per foot in front, whatever on measurement it shall hold out: one-third payable on signing this contract; one-third in six months; and the remaining third in twelve months. A deed of general warranty in fee simple to be made by the said Taylor to him, Longworth, in the course of three months; and a mortgage given on the premises to secure the remaining payment.

Witness our hands and seals, at Cincinnati, this 5th April, 1814.

(Signed) JAMES TAYLOR, [SEAL.]
Teste: *by* JAMES T. EUBANK, *Att'y in fact.*
N. LONGWORTH. [SEAL.]

Endorsed—"Rec'd April 5th, 1814, twenty-four hundred and fifty-eight $\frac{33}{100}$ dollars, supposed to be about the first payment.

(Signed) JAMES T. EUBANK,
(A copy.) *for* JAMES TAYLOR."

Continuance.

And thereupon this cause was continued.

Continuances at Rules.

And afterwards, to wit, at rules held in the clerk's office of said court, in the months of January, February, March, April, May, June, and July, in the year of our Lord one thousand eight hundred and twenty-seven, this cause was further continued.

Leave to amend Bill.

And afterwards, to wit, at the July term of said court, in the year last aforesaid, "came the complainant, by his counsel, and, on mo-

tion, leave is granted him to amend his bill, on the payment of the costs of this term."

Continuance.

And thereupon this cause was continued.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, this cause was further continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and twenty-eight, came the said complainant, by Samuel Lewis, Esquire, his solicitor, and filed in court here a supplement to his said original bill of complaint, which said supplemental bill is in the words and of the tenor following, to wit:

Supplemental Bill.

"To the Honorable the Judges of the Circuit Court of the United States, sitting within the seventh circuit, in the State of Ohio.

The supplemental petition of Nicholas Longworth respectfully represents to your honors, that heretofore, to wit, your petitioner filed in your honorable court a petition, on the chancery side thereof, setting forth, among other things, that, some time in the year 1815, your petitioner purchased of one James Taylor, of the State of Kentucky, (your orator being a resident of Cincinnati, in the State of Ohio,) a part of lot No. 81, in Cincinnati, beginning at the southwest corner of said lot, on Main street; thence northwardly on Main street fifty-nine feet, and the same width back, at right angles, half the depth of the lot; supposed to be one hundred feet; for which your orator was to pay the sum of one hundred twenty-five dollars per foot, front, and to pay one-third thereof at the time of signing the contract; the remaining two-thirds to be paid in two equal instalments, without interest. And that the said contract, which was made in writing, was lost or mislaid, so that the same could not be obtained by your orator; the terms of said contract could not be stated with precision, nor the date; and that your orator paid to said *Lytle*, at the time of executing said contract, $, being one-third of the consideration money, which had been endorsed on the back of said contract. That your orator had expended in improving said lot more than $1000; and when the remaining two-thirds of the purchase money for said lot became due, your orator commenced paying interest on said balance of purchase money, which was continued to be paid by your orator and received by said Taylor up to the time that an adverse title to the premises was set up; and a part of the time he was required to pay, and did pay, nine or ten per cent. interest for the use of said money, which said Taylor agreed to receive, and did receive, up to the latter part of 1819, and give further time for the payment of the principal. That a part of said premises had been sold by your orator. The amount paid must in a great measure depend on the disclosure of Taylor, as your orator had not kept an account of the payments, except as stated in the original bill. That out the year 1820, your orator and said Taylor were negotiating for

the payment of said purchase money, and said Taylor agreed that your orator should arrange so much of the debt of said Taylor in bank; which arrangement being proposed by your orator, said Taylor refused to complete the understanding. That shortly after this time, your orator was informed, for the purpose of charging him with notice, that there was a better title to said lot No. 81, than the said Taylor's, in one Chambers and Chambers, his wife; on which claim there was a suit in chancery brought in Hamilton common pleas court, which was still pending. That said James soon thereafter brought an action of ejectment against the tenants holding under your orator, to obtain possession of said lot; that your orator made other propositions, as therein stated, for the payment of said money, and would have paid the whole of the money in hand to the said Taylor, but for the dispute in the title; and your orator was advised by counsel that the adverse title of said Chambers and wife to said lot was the better title, and must succeed, and that your orator would be unsafe in paying the balance of the purchase money. That your orator finally, to have the business closed, on said Taylor, and requested a statement of the balance of money claimed by him, telling him that for some payments he had no receipts, and depended on his honor; and that a similar call was made to D. K. Este, Esq., the attorney for said Taylor, but had always been refused; and your orator found it impossible to obtain any account of the balance due; but the said James went on with his ejectment, and had taken out his writ to get possession of the said premises. That even after this, your orator proposed again to pay the balance of the purchase money in hand, and depend on the ability of said James to repay, in case of failure of title; but that said James has refused all terms, and insisted on the possession of the premises. Your orator had before, several times, proposed to enter into any arrangement that might be satisfactory, by paying a part of the money in hand, and the residue whenever the title should be settled. Your orator also, in his said original bill, called on James Taylor, the defendant therein named, to discover, under his oath, and fully answer the matters and things in said bill contained, and especially what were the terms of said contract; what payments had been made; and whether he did not receive unusual interest for further time for the payment of said purchase money; what the per cent. interest was quarterly, and what the gross amount; and whether certain letters were not written on the subject of the payment of said money, and what was the purport of such letters; and whether your orator did not make the several offers of accommodation aforesaid; and whether your orator did not require a statement of the balance due; and whether said Taylor did not refuse to furnish a statement of the amount claimed; and whether he had not lately said he would not even take the balance due, and guarantee the title; whether by the contract aforesaid was not for a deed of general warrantee. And your orator prayed in his said bill, that on a final hearing thereof, if it should appear that the title to the said property was not in the said James, and that he

could not make a valid title for the same, that he might be compelled to repay to your orator the amount paid on account of said purchase, together with expenses of improvement and taxes, and other expenses relating thereto, with interest, deducting therefrom a reasonable sum for the use of the same. But if it should appear to your honors that the said James could make a good and valid title for the same, then your orator prayed a specific execution of the contract, on such terms and times as to your honors should seem equitable; and that your honors would compel the said James to do what in equity and good conscience he was bound to do. And your orator also prayed for an injunction to restrain said James from obtaining possession of said premises until the matters could be heard in your court of equity. Which original bill was duly sworn to on the 6th day of Sept. 1824; and to which bill the said James Taylor filed his answer, setting forth that said contract was made on the fifth day of April, 1814, for the lot aforesaid, the amount of purchase money being $7,406 25, one-third of which was paid in hand, and complainant put in possession of the lot; a deed of warranty was to be made to Longworth in three months, and a mortgage taken to secure the residue of the purchase money—to wit, half in six, and the remainder in twelve months. Said answer also admits that said Longworth paid an unusual interest on said balance up to 31st Dec. 1817. Said answer admits payments made on account, over and above the one-third, as follows:

1815, July 5, - - - - -	$303 40
1817. In'st up to December 31st, amount not recollected.	
1818, April, - - - - -	100 00
Sept. 30, - - - - -	81 00
1819, July 21, - - - - -	150 00
Aug. 18, - - - - -	100 00
Sept. 2, - - - - -	120 00
	$854 40

That said Taylor brought suit in September, 1822, to complete said contract or put an end to it; that pending said ejectment, said Longworth made several propositions to make a new contract for the payment of the balance due, which the said James refused to make, but at all times declared his readiness to accept the balance of the purchase money and interest, and make a conveyance; that in July, 1824, he obtained judgment on his ejectment, and in August took possession of the premises. That in 1823 one Chambers and wife set up an equitable title to said lot, and commenced a suit in chancery therefor; that said James had been in peaceable possession since 1793, having obtained a deed in 1798; that improvements made on said lot are of little value, and that if an account were taken of payments, improvements, rents and profits, said Longworth would fall in debt; and finally, that said Longworth, having neglected to comply with his contract for a number of years, cannot require a specific ex-

ecution thereof; that a court of equity cannot direct an account of purchase money, improvements, rents and profits, under a contract put an end to by the refusal of the party to comply with the same; and said answer prays to be dismissed, &c. But before replication filed, or issue taken in the suit aforesaid, your orator has discovered, and now charges the fact to be, that said James Taylor, with the sole and only purpose of defrauding your orator out of the benefit of his purchase aforesaid, has himself so conducted the business as to create the delay himself, in order that your orator might be induced to defer the final payment of the residue of the purchase money, until he could take such steps as would amount in his opinion to a disaffirmance of said contract, and he be able to hold all the money he has received, with interest on the residue up to 1820, or 1821, and then secure the whole property; and your orator charges that to effect this purpose he first changed the contract, so far as to the time of payment, and gave an extension in consideration of receiving the same interest that bank stock paid at the time; and your orator charges that he did receive such extravagant and high interest on the whole sum, down to March 31st, 1819, which appears by his receipt, which your orator has discovered since filing his original bill: said interest was, your orator thinks, nine per cent., which, from the time said payments became due, up to the said 31st March, 1819, would amount to $1919 00, or about that sum; and your orator has discovered, since filing said bill, that he paid Taylor, in

July, 1819, - - - - - -	$150
18th August, 1819, - - - - -	100
Sept., 1819, - - - - -	120
and he has Taylor's receipt for - - - -	100
Paid August 24, 1819, making - - - -	$470

over and above the interest, up to March 31st, 1819, which, if applied to interest only, as your orator charges the fact to be, it appearing as well from the answer of said Taylor, as the voucher remaining now in your orator's hands, would pay the interest on the purchase money due on said contract, up to October 31st, 1820. Your orator believes there have been still further payments made, but with all his care he has not been able to discover any others; but again calls on said James Taylor to answer under oath whether the payments in this supplemental bill named were or were not made, and whether any other were made; and when and what sums.

And your orator further charges, that said Taylor did not make out said deed within three months, and tender it to your orator; nor has he ever made or tendered a deed to your orator, and demanded his money; on the contrary, he agreed to receive, and did receive the interest and full satisfaction for delay, up to Oct., 1820; and from that time to the time he brought his suit in ejectment aforesaid, he was amusing your orator by negotiating the business; and he purposely delayed the final trial of the suit with Chambers and wife, in order to

leave a shade over the title to intimidate your orator, and induce him to suspend payments; and he, said Taylor, has not, until very lately, answered said bill, nor has he yet permitted the same to come to final hearing.

And your orator further charges, that since filing the aforesaid bill and answer, discovering the matters set forth in this supplemental bill, and wishing to put the question at rest, again placed in the hands of Samuel Lewis, his attorney, a sum of money, amounting to more than $8000, with directions to call on said Taylor and tender him the amount due, whatever that sum might be, and demand a deed for the premises aforesaid; and your orator is informed and believes that said Lewis did, about the fifth day of July, 1827, go to the house of said Taylor, and request him to state the amount due from your orator, taking the sum of money with him, and offering to pay the same, or so much as should be found due to said Taylor, on an exhibition of his accounts; but that said Taylor absolutely refused to receive any part of the money or make a deed as aforesaid, or treat in any manner on the subject; and your orator has now the money, whatever it may amount to, say $———, ready to pay to said Taylor, as this court shall direct, on receiving a deed from said Taylor, with the usual covenants, according to the contract. To the end, therefore, that the said Taylor may be compelled to answer the matters and things herein before charged, by way of supplement, and that he may be compelled to answer and state fully what amount of rents he has received from said since he took possession thereof. And on a final hearing of this case may it please your honors to grant and award such a decree as from the circumstances of the case your orator shall be entitled to.

SAMUEL LEWIS,
Att'y for Compl't.

Continuance.

And this cause was thereupon continued.

Continuances of Rules.

And afterwards, to wit, at rules held in the clerk's office of said court, in the months of August, September, October, November, and December, in the year last aforesaid, this cause was further continued.

And afterwards, to wit, at the December term of said court, in the year of our Lord one thousand eight hundred and twenty-eight, came the said respondent by Charles Hammond, Esquire, his solicitor, and filed in court here his answer to the said supplemental bill of the said complainant; which said answer is in the words and of the tenor following, to wit:

Answer to Supplement.

"To the Honorable the Judges of the Circuit Court of the United States for the Seventh Circuit and District of Ohio, in Chancery sitting—The answer of James Taylor to the supplemental bill of Nicholas Longworth, in this court exhibited against him.

This respondent, saving and reserving to himself all benefit of advantage to the many errors and imperfections in said supplemental bill contained, for answer thereto saith: That true it is the original bill, and the answer thereto, was filed as in said supplemental bill is set forth. This respondent positively and unequivocally denies that he has managed or conducted the transactions or "business" of the contract in said bill alleged, with any view or with any design or intention to induce complainant to defer the payment of the whole balance of the purchase money, for the purpose of securing to himself a disaffirmance of the contract, and a right to retain both the ground sold and the purchase money paid. This respondent positively denies that to effect this purpose he changed the terms of the contract as to the time of payment: this respondent, on the contrary, agreed to forbear the immediate prosecution to enforce payment, at the request and for the accommodation of the complainant, without any wish to disaffirm the contract; and this respondent repeats, that it was not until after said complainant had for several years wholly neglected to pay the interest according to his agreement that the ejectment was commenced, not to disaffirm, but to coerce the performance of the contract, or to put an end to it. And this respondent also repeats, that during the pendency of the ejectment he was at all times ready and willing to accept the balance of the purchase money due, and complete the contract. This respondent denies any knowledge of any moneys received by him, except those stated in his answer to the original bill; and he avers his belief, and asserts the fact to be, that the payments alleged and charged in the supplemental bill are the same and no other as already admitted in the answer to the original bill. The receipt for one hundred dollars, dated 24th August, 1819, which the complainant in his supplemental bill alleges he has found, this respondent avers is the same one hundred dollars which he, this respondent, has credited as being received on the 18th of the year aforesaid—and that in affixing the date he, this respondent, has made a mistake, he having depended on his memory to give the credit on his books or papers.

This respondent admits that he did not make out and tender a deed to the complainant within three months, as by the contract required; and this respondent insists that his not doing so cannot now in any respect vary the rights of the said complainant, or the rights of this respondent.

This respondent denies that he at any time amused said complainant with negotiations, or that he purposely delayed the trial of the suit with Chambers and wife in order to induce said complainant to

suspend payments; or that he now delays the trial of said cause with any reference to the claims of the complainant.

This respondent knows nothing of any sum of money placed by complainant in the hands of Sam'l Lewis, Esq., for the purpose of making payment to this respondent. He admits that said Lewis, some three years after he had obtained possession of the premises in question upon a writ of possession, came to respondent's house and commenced a conversation with respect to said contract, when this respondent refused to hold any conversation with said Lewis, or receive any propositions from him thereto. This respondent insists that he, said complainant, hath so long neglected the performance of the contract on his part, and has so long slumbered over his alleged equity, that he cannot now, when the value of the property is equally enhanced, be aided in this court. And having answered the supplemental bill, this respondent prays to be hence dismissed with his costs, &c.

C. HAMMOND,
Counsel for Respondent.

UNITED STATES 7TH CIRCUIT COURT, *Ohio District*,
December Term, 1828.

Personally appeared in open court, this 31st day of December, 1828, James Taylor, the party defendant named in the foregoing answer, and, being by me duly sworn, says that the several matters and things contained in the said answer, so far as stated from his own knowledge, are true; and so far as stated from the knowledge of others, he believes to be true; and further says not.

JAMES TAYLOR.

Sworn to and subscribed in open court.
Attest: WM. KEY BOND, *Clerk.*

Continuance.

And this cause was further continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and twenty-nine, came again the said complainant, by Caswell and Starr, Esquires, his solicitors, and filed in court here his replication to the answer of the said respondent, in the words and figures following, to wit:

Replication.

"DISTRICT OF OHIO, CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *7th Circuit, and District of Ohio.*

NICHOLAS LONGWORTH
vs.
JAMES TAYLOR. } In chancery.

The above complainant, by his counsel, for replication to the answers of the said defendant, says, that he will verify and prove that

all the allegations in his said bill, and amended bill, are true in substance and matter of fact; and further, the matters set forth in the answers of the said defendant, so far as they contradict the statements of the said complainant's bill, are untrue; all which the complainant is ready to verify and prove, as this court shall order and direct. CASWELL & STARR, *Sol's for Compl't.*

Evidence—July Term, 1829.

And the said complainant thereupon filed in court here the following depositions and exhibits, as evidence in this cause, to wit:

Depositions.

DISTRICT OF OHIO, CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *for the District of Ohio.*

NICHOLAS LONGWORTH *vs.* JAMES TAYLOR. } In chancery.

The defendant and his counsel will please take notice that on Wednesday next, the first day of July, we shall proceed to the depositions of Samuel Lewis, William McLaughlin, and others, before Samuel F. Hunt, master commissioner in chancery for said court, at his office, on Front street, Cincinnati, between the hours of eight o'clock in the morning and seven in the evening of said day; which depositions are to be read in evidence in the above entitled cause.

Yours, &c. N. LONGWORTH,
By CASWLEL & STARR, *his Att'ys.*

June 26th, 1829.

Endorsed—" Service acknowledged.
HAMMOND & GARRARD, *for Taylor.*"

Deposition of Samuel Lewis.

"CIRCUIT COURT OF THE UNITED STATES, *Seventh Circuit, and District of Ohio.*

NICHOLAS LONGWORTH *vs.* JAMES TAYLOR. } In chancery.

Before Samuel F. Hunt, master commissioner in chancery for the court aforesaid, at his office in Cincinnati, on the first day of July eighteen hundred and twenty-nine, personally appeared Samuel Lewis, of lawful age, who, on his solemn affirmation, declares and says: Some time in the year 1826, as affirmant thinks, N. Longworth re-

quested him to call on James Taylor, and get the amount of balance due him for the lot purchased of said Taylor by said Longworth, on Main street; and affirmant was directed to say, that if the amount could be ascertained by said Taylor, who had kept all the accounts, the money should be paid in hand. This affirmant, in compliance with that request, saw James Taylor, as near as he can recollect, in the fall of 1826, and made the proposition to him; and informed said Taylor that said Longworth could not get at the amount himself, but if he, Taylor, would state the amount, it should be paid immediately. To which said Taylor replied, that he had nothing to do with Mr. Longworth; he had possession of the lot, it was his, and he did not wish to part with it. Affirmant informed him that John Mears had purchased a part of the lot, and it was important, on his account, to have it settled, as Mears wished to build. Said Taylor refused to have any further conversation on the subject at that time.

Affirmant further saith, that N. Longworth, some time between the first and tenth day of July, 1827, placed in affirmant's hands a sum of money, amount not now recollected exactly, but it was over seven thousand dollars; a large part of it was in notes of the United States bank; which money affirmant took with him to James Taylor, in Newport, Kentucky; and said Taylor, when affirmant informed him what his business was, went into his office, inviting affirmant to go in with him; and when in, said Taylor informed affirmant that he could make any communication he wished to his son-in-law, Mr. Tibbatts, who was then present. Affirmant then informed said Taylor and Tibbatts that he had brought with him upwards of seven thousand dollars, showing them the money, for the purpose of paying the balance due by Mr. Longworth to him, Taylor, being the balance of purchase money for said lot. Affirmant then requested said Taylor to state the balance due, and receive the money, and as it was some distance, he had brought the paper; but, if he preferred specie, he would return while he was making out the accounts, and get the specie, and have the specie there in one hour. James Taylor made no reply, except that he had nothing to do with it. Mr. Tibbatts merely stated that Mr. Longworth must know he stood on his legal rights. Affirmant then showed the money, and wished to know if the objection was because it was paper and not specie, as he could easily obviate that difficulty. Mr. Tibbatts replied that he made no such objection; the parties were at law, and they must take care that they did not compromit their legal rights. Neither of them would receive the money, or have any other conversation with affirmant. This tender was made in the early part of July, 1827, affirmant thinks on the fifth of July. The lot to which we referred in our conversation, viz: Taylor and affirmant, was part of inlot No. eighty-one, lying directly north of other property owned by John Mears, on Main street.

Affirmant is acquainted with the handwriting of James Taylor, and believes that the vouchers hereto attached, marked A and B, to be signed by James Taylor, in his proper handwriting; the letter is

written by him, Taylor, and the receipt in the body is in N. Longworth's handwriting, signed by said Taylor. Affirmant has seen said Taylor write often.

SAMUEL LEWIS.

The above and foregoing deposition of Samuel Lewis was taken, affirmed to, and subscribed before me, at my office in Cincinnati, this first day of July, eighteen hundred and twenty-nine, in pursuance of the annexed notice.

SAML. F. HUNT, *M. C. in Chancery.*

Deposition of Ebenezer Tuttle.

At the same time and place personally appeared Ebenezer B. Tuttle, of lawful age, who, being duly sworn according to law, deposeth and saith: That in the year 1814, Zenas Robinson and this deponent built four stores for N. Longworth, on Main street, on part of lot eighty-one. Lumber and other materials were high. The carpenter work amounted to $1164 83. The best estimation I can make, the building and materials did cost three thousand four hundred dollars.

EBENEZER B. TUTTLE.

The above deposition of Ebenezer B. Tuttle was taken, sworn to, and subscribed before me, at my office in Cincinnati, this first day of July, 1829, in pursuance of the annexed notice.

SAMUEL F. HUNT, *M. C. in Chancery.*

Deposition of Stephen Burrows.

At the same time and place personally appeared Stephen Burrows, of lawful age, who, being duly sworn according to law, deposeth and saith: That in 1818 or 1819, he first became acquainted with the claim of Chambers and wife, to lot No. 81, in Cincinnati, and investigated the facts; and knowing that N. Longworth had possession of part of said lot, I called on him, and advised him of the claim; and think that as early as the fall of 1819, or early 1820, he advised Longworth of the claim; and that, in my opinion, and the opinion of the attorneys, Wright & Benham, the claim was a formidable one. And states that he was aiding Chambers and wife in ascertaining by whom the necessary facts could be proven; and having made the necessary investigations, suit was commenced, say about 1823, but the date the files will show; much time being necessarily employed, as persons acquainted with the facts lived at a distance. Longworth informed me he could not lose greatly, as he had not paid Taylor up for the lot, and should not till the claim was ascertained, and expressed a wish that it might be decided speedily; informed him what could be proven as far as I was then advised; and my opinion then was, and now is, that he ought not to have paid the money till the suit was decided; and it is still pending, and my opinion still is, that

the claim of Chambers and wife will succeed if justice is done. I informed said Longworth suit would be brought as soon as the necessary investigation could be completed, and subsequently conversed with him on the subject occasionally when we met.

Question by complainant.—How does the present value of lot No. 81, and other lots near it, compare with the value during the year 1819?

Answer.—The nominal price was about the same.

STEPHEN BURROWS.

The foregoing deposition of Stephen Burrows was taken, sworn to, and subscribed before me, at my office, this 1st day of July, 1829, in pursuance of the annexed notice.

SAMUEL F. HUNT, *M. C. in Chancery.*

Deposition of Enos Woodruff.

At the same time and place, personally appeared Enos Woodruff, of lawful age, who, on his solemn oath, declared and said, that he has occupied one of the buildings, being part of lot No. 81, now in controversy between the parties, since October, 1817, until the present time; the first year Gen. Taylor took possession under his ejectment, which was, I believe, in 1824, I paid one hundred and fifty dollars for the year's rent; 2d year, in 1825, I paid him one hundred and seventy-five dollars; 3d year, 1826, I paid him same price, and continued to pay the same rent until September, 1827; since which time have paid him at the rate of two hundred dollars per year.

Question by complainant.—What rent did you pay for the same premises for the year 1819?

Answer.—I paid two hundred and fifty dollars.

ENOS WOODRUFF.

The above deposition of Enos Woodruff was taken, sworn to, and subscribed before me, at my office in Cincinnati, this first day of July, 1829, in pursuance of the annexed notice.

SAM'L F. HUNT,
M. C. in Chancery.

Deposition of O. Owens.

At the same time and place, personally appeared O. Owen, of lawful age, who, on his solemn oath, declared and said as follows: I have paid for that part of the disputed premises which I occupy, from the time Gen. Taylor received possession until 3d Sept., 1827, two hundred dollars per year; since which time I paid two hundred and fifty dollars per annum. I occupy one of the four frame buildings now in controversy between Longworth and Taylor, part of lot No. 81, in Cincinnati.

O. OWENS.

Taken, sworn to, and subscribed before me, at my office in Cincinnati, this first day of July, 1829, in pursuance of the annexed notice.

SAM'L F. HUNT,
M. C. in Chancery.

Deposition of Nath'l Wright.

At the same time and place, personally appeared Nathaniel Wright, of lawful age, who, on his solemn oath, declared and said as follows, to wit: I was applied to by Mr. Burrows, on behalf of Mrs. Mary Chambers, said to be the heir at law of James Millan, to prosecute a claim for her against Gen. James Taylor, for the inlot No. 81, in Cincinnati, as early as June, 1819, perhaps previous—I cannot now fix the date earlier—and set about investigating her claim. The facts necessary were to be obtained, many of them, from persons at a distance, some of whom were not found till a considerable time afterwards; neither Mrs. Chambers nor Mr. Burrows, her agent, could give much information on the subject, and the business was in this way delayed till near the close of 1823, before suit was brought. I recollect having been spoken to by Nicholas Longworth, Esq., at different times relative to the claim of Mrs. Chambers on the lot, and think he asked me what I thought of the validity of the claim. I well recollect understanding at an early period that Mr. Longworth had purchased a part of the lot, and that there was purchase money unpaid by him; and that I stated to him that Mrs. Chambers intended to hold the lot if possible, and the back rents. I cannot recollect particularly what statements I made to Mr. L. relative to the validity of Mrs. Chambers' claim; but I presume from the circumstances that I must have spoken of it as a valid claim, as I should otherwise have incurred the hazard of misleading a purchaser, and discredited the title of my own client. I cannot fix any date to these conversations: the suit was commenced near the close of the year 1823, and I am under the impression that they took place, some of them, prior to that time, perhaps a considerable time previous, but I cannot fix the dates with certainty. I think I stated to Mr. Longworth, that if he paid his purchase money for the lot he would lose it, unless he had a good warranty. I recollect directing notices of Mrs. Chambers' claim to be served on other persons, who it was said were about to purchase a part of the lot prior to the suit being brought.

Question by complainant.—May it not have been as early as the fall of 1819, or the spring of 1820, that you gave me notice of the claim?

Answer.—It might have been; I cannot fix the time.

By the same.—Did you consider the claim a formidable one; and what was the opinion of your colleague, Jos. S. Benham?

Answer.—I did; and I believe Mr. Benham was of that opinion.

NATH'L WRIGHT.

Deposition of D. Tutwiler.

I occupy one of the four frame buildings on lot No. 81, in controversy between the parties. I rented from James Taylor the 27th of Sept., 1827. I paid him at the rate of one hundred and ninety-five dollars per year, and since that I am to pay him at the rate of two hundred and eighty-two dollars and fifty cents per year. The house north of me is one of the four lots in controversy, and has been, and is occupied by Wm. McLaughlin, from the same date to the first Sept., 1827, at two hundred dollars per year; and since that time at the rate of two hundred eighty-two $\frac{50}{100}$ per year.

D. TUTWILER.

I certify that the foregoing deposition of D. Tutwiler, and also the deposition of N. Wright, were severally taken, sworn to, and subscribed before me, at my office in Cincinnati, this first day of July, 1829, in pursuance of the annexed notice.

SAM'L F. HUNT,
M. C. in Chancery.

Vouchers.

The vouchers referred to in the foregoing deposition of Samuel Lewis are as follow, to wit:

A.

"NEWPORT, *Aug.* 24, 1819.

"DEAR SIR: Will you be so good as to send me, by the bearer Reuben, the fifty dollars promised me last evening; which, added to the fifty paid me, this will make one hundred dollars, to be credited as toward your contract for the ground sold you by James T. Eubank, in Cincinnati. I also rec'd, on the 18th inst., one hundred or the same amount. You must make me up two hundred dollars more by the last of the week or my building must stop.

"Respectfully, your ob't serv't,
"JAMES TAYLOR.

"NICH'S LONGWORTH, Esq."

B.

"Rec'd of N. Longworth the interest on the property sold him on Main street, to the 31st March next.

"JAMES TAYLOR.

"*Feb.* 25, 1819."

Deposition of D. Gano.

N. LONGWORTH
vs.
JAMES TAYLOR et al. } In chancery—U. States Court, Ohio.

D. GANO, Esq.

Will you state what was the relative value of lots on Main street, between 2d and 3d streets, Cincinnati, during the year 1819 and at present?

It is my impression that property in Cincinnati is now in the general about as high as it was in 1819, and in some places, from local causes, higher; but it is my impression that property between 3d and 2d streets has not been affected by those causes; but the value equalized between Front street and Canal, in a greater degree.

Were lots higher or lower in 1824 and 1827?

In 1820, I think, property was held about the same as in 1819; but no sales of consequence effected; and that from that time property depreciated for some years, and for the last four or five years again increasing, in my opinion, on a more solid basis, since the redundancy of paper currency, from banks then not paying specie, has been put out of circulation.

Yours, DAN'L GANO.

Cincinnati, July 7th, 1829.

STATE OF OHIO, *Hamilton county, sct:*

Personally appeared before me, the master commissioner in chancery, for the court of common pleas and supreme court for said county, Daniel Gano, above named, who, being sworn, saith that the facts stated, by way of answers to the interrogatories above, are true to the best of his opinion and belief; and further he saith not.

DAN'L GANO.

Sworn to and subscribed before me, at my office, this 10th of July, 1829.

SAML. F. HUNT,
M. C. in Chancery.

Deposition of James Ferguson.

N. LONGWORTH
vs.
JAMES TAYLOR et al. } In chancery—U. States Court, Ohio.

Question to James Ferguson by complainant. Have you owned property on Main street, and other parts of Cincinnati, for a number of years past?

Answer. I have.

[REC. .]—4

How did the price of lots on Main street, during 1819, say from 4th street to 2d street, and particularly in the vicinity of lot No. 81, compare with the present price?

I think the asking prices were about the same, but do not know of any sales.

By the same.—Was not the same property lower in 1824, 1825, 1826, and 1827?

Answer.—I believe and know that property was valued much lower in 1824, 5, and 6, and was also lower in 1827, than at the present, or in 1819.

By the same.—Was not property in the vicinity of lot 81 as high in 1819 as at any future period?

Answer.—There was no period that property was higher in Cincinnati than 1819.

JAMES FERGUSON.

STATE OF OHIO, *Hamilton county, sct.*

Personally appeared before me, Samuel F. Hunt, master commissioner in chancery of the common pleas and supreme courts of said county, James Ferguson, whose signature is above attached, and he, being sworn, saith the facts set forth in the within and foregoing deposition, are just and true, to the best of his knowledge and belief.

Sworn to and subscribed before me, at my office, at Cincinnati, this 10th July, 1829.

SAML. F. HUNT, *M. C. in Chancery.*

Document from files of Hamilton Common Pleas.

EXHIBITS.

"THE STATE OF OHIO, *Hamilton county, ss:*

To the Honorable the Judges of the Court of Common Pleas of the County of Hamilton aforesaid, in chancery sitting:

Humbly complaining, show unto your honors your orators, John Chambers, and Mary Chambers, his wife, late Mary Millan, daughter and only heir at law of James Millan, late of Hamilton county, aforesaid, deceased; that one Mathias Denman, having purchased by contract of John Cleves Symmes the section of land No. eighteen, and the fractional section No. seventeen, both of fourth township, and first fractional range of townships between the Miama rivers, situate in Hamilton county aforesaid, on or about the twenty-fifth day of August, A. D. 1788, contracted to sell to Robert Patterson and John Filson, each, one undivided third part of his interest in said section and fraction; and the said proprietors shortly after proceeded, according to a plan agreed upon among themselves, to lay out on

said lands the town now called Cincinnati, but then named Losantiville; that the said John Filson was soon after killed by the Indians, and not having paid his purchase money, or complied with the conditions of his contract of purchase, the said Patterson and Denman, considering his interest as forfeited, sold the same to one Israel Ludlow, who continued to act as one of the proprietors of said town. That said Robert Patterson, about the 26th day of Nov., A. D. 1794, sold his interest in said lands to one Samuel Freeman; and the said Matthias Denman, on or about the 4th day of March, A. D. 1795, sold his interest in the said lands to one Joel Williams. That John Cleves Symmes, by contract with the United States of America, in the year 1787, purchased a large tract of land between the Miami rivers, comprehending the lands above described, but did not obtain the legal title thereof until the 30th day of September, A. D. 1794; at which date a patent regularly issued from the United States aforesaid, vesting said John C. Symmes with the legal title in fee simple of the same.

Your orators further show, that the customary method adopted by the proprietors aforesaid, in making sales of lots, in the said town of Cincinnati, was to execute to the vendee an instrument of writing, sometimes called a bill of sale, purporting that the persons named therein was the purchaser of the lot or lots therein described, and when the purchase money was paid, to deliver to such vendee a further certificate, purporting that the person therein named was entitled to receive a deed for such lot or lots; and by agreement between the proprietors and John C. Symmes, the said Symmes was obligated to execute a deed in fee simple to such purchaser, so soon as the patent was obtained from the United States; and after the patent was obtained, it was further agreed between the same parties, that said Symmes should retain the legal title of the section and fraction above named, and should make deeds to such persons as the proprietors should direct, he holding of the title merely as trustee for the proprietors; the purchase money having been paid by Denman to Symmes at the time of his purchase, as first above stated. All which circumstances respecting the title of the town were well known in Cincinnati and its vicinity, from the time the town was laid out until the present day. And by the above agreement said Symmes was obliged to execute deeds in fee simple to those persons in whose favor the proprietors had issued certificates of payment in manner above stated.

Your orators further show to your honors, that James Millan, (father of your oratrix, Mary Chambers,) about the year of our Lord seventeen hundred and ninety-two, purchased of the said proprietors inlot No. eighty-one, as numbered on the plan of Cincinnati aforesaid, and paid the purchase money in full for the same, and received from the proprietors a certificate of such purchase and payment, in the usual form, entitling said James Millan to a deed in fee simple from said Symmes for the said lot. That said Millan, not long after his purchase, being obliged to leave Cincinnati on business, left his

said certificate, with other papers, in the hands of one John Bartle; and the said certificate, by some means to your orators unknown, came to the possession of James Taylor, whom your orators pray may be made defendant to this their bill; and who, well knowing the premises, and without any right to said certificate, wrongfully procured a deed for said lot from John C. Symmes, the deed bearing date December 19th, A. D. 1798, although the right in equity to the lot, then, was in said Millan, and so continued to the time of his death.

Your orators further show, that said Millan afterwards, about the year 1805, died intestate, leaving your oratrix, Mary Chambers, his sole heir, then a minor, of the age of sixteen years, who afterwards, in the year 1808, intermarried with the said John Chambers. And your oratrix, Mary Chambers, has ever, to the utmost of her ability, asserted and endeavored to prosecute her said claim, but being poor, and little acquainted with such matters, has been delayed by circumstances beyond her control until the present time. She has applied to different persons to assist in prosecuting her claim, who have either misled her by their counsel, or ultimately abandoned her. In 1813, she employed one Seth M. Leavenworth, an attorney of this court, who for several years flattered your orators with the prospect of success, but finally abandoned them and left the State; which circumstances are the cause the claim of your orators has remained so long without being prosecuted.

Your orators further show to your honors, that said James Taylor has sold a part of said lot to Nicholas Longworth, whom your orators pray may be made defendant to this their bill, and who purchased with a knowledge of the premises, and the said claim of your orators. And said Longworth has sold a part of the lot to John Mears, Thomas D. Carneal, and David Griffin, all of whom your orators pray may be made defendants; and who all purchased with knowledge of the premises, and the claim of your orators: but your orators are not able to state the specific parts or quantity of the lot purchased by each, although each of said purchasers still claim an interest therein.

Your orators further show, that said John C. Symmes died about the year 1815, having by his last will and testament, since duly proved and recorded, authorized and empowered his executors, William H. Harrison and John C. Short, (whom your orators pray may be made defendants to this bill) to execute deeds of conveyance for all lands which he, the said Symmes, was obligated by contract to convey. Your orators also show, that during the lifetime of said John C. Symmes, an office containing many of his papers was consumed by fire, and in case the said certificate of James Millan had been taken up by him, it probably was burnt. And your orators did well hope that the said James Taylor, Nicholas Longworth, and others, purchasers under them above named, having no title in equity to said lot, would have delivered up the same to your orators, and relinquished their claim thereto; but now so it is, may it please your honors, that

said James Taylor, Nicholas Longworth, Thomas D. Carneal, John Mears, and David Griffin, combining and confederating with divers persons, unknown to your orators, whose names, when discovered, your orators pray may be inserted in this their bill, with apt. and prop., or words to charge them as defendants, how to injure and defraud your orators, utterly refuse to relinquish to your orators the lot aforesaid; but have for a long time, to wit, since the year 1798, retained possession thereof, and received a large amount of rents and profits of the same, for which they refuse to account to your orators; all which is contrary to equity and good conscience, and tend to the manifest injury of your orators. In tender consideration whereof, and inasmuch as your orators are remediless in the premises, by the strict rules of the common law, and relievable only in equity, where matters of this sort are properly cognizable and relievable; to the end therefore that the said James Taylor, Nicholas Longworth, Thomas D. Carneal, John Mears, David Griffin, William H. Harrison and John C. Short, may, upon their corporal oaths, according to their knowledge, information and belief, full, true, and perfect answers make to all and singular the premises; and that as fully as if the same were here again repeated, and they interrogated thereto; and especially that the said James Taylor may set forth and discover by what right he obtained his deed from John C. Symmes, for said lot No. eighty-one; whether he obtained it on any certificate from the proprietors of Cincinnati; if so, what was the purport of that certificate; in whose favor was it drawn, and what right had he, the said Taylor, thereto; whether he, the said Taylor, has not had in his possession the certificate of said proprietors in favor of James Millan for said lot No. eighty-one, or has not seen the same; whether he has not had in his possession, or seen some instrument of writing showing the interest of said James Millan in said lot eighty-one, or in some way relating to the same; whether he knows any thing of said paper or certificate; where the same now is, and what was the last disposition of it, within the knowledge of the said Taylor; whether said Taylor ever had any legal right to the same; and if so, how acquired, through whom, at what time, and for what consideration; and what was the nature of such right; whether the said certificate or other paper of said Millan, relating to the title of said lot eighty-one, was not left in the possession of said Taylor by John Bartle, by whom it was left with him; in what manner, and for what purpose was it left, and what disposition was made of the same; whether said certificate was ever assigned by said Millan to said Taylor; if so, by whom was the assignment made, what was the purport thereof, and at what time was it made; for what purpose, and on what conditions the said certificate, or other paper relating to the title of said lot, was left with said John Bartle by James Millan; whether he did not know that said Millan had claim to said lot; what amount of rents and profits he has received for said lot; and what has been the yearly value thereof since 1798. That said Longworth, Carneal, Mears and Griffin, may respectively set forth what portions of said lot they

have purchased; and at what time, and what has been the yearly value of the parts owned by each, since their respective purchases; and that each of them, for himself, may set forth, whether he has yet paid the purchase money, and received a deed for the part so by him purchased, and whether he did not know, or had not heard of the claim of your orators, before the whole of the purchase money was paid and the deed delivered; that the said executors of John C. Symmes may set forth whether they know or have heard any thing respecting the certificate of James Millan for said lot eighty-one, or any paper relating to his right thereto; and what they know respecting the same. And that the said executors of John C. Symmes, by decree of this honorable court, may be required to execute to your orators a deed in fee simple for said lot 81; that the said deed from John C. Symmes to James Taylor may be declared void; and said Taylor, Longworth, Carneal, Mears and Griffin, be compelled to release to her all their interest in said lot, and also to account for the rents and profits thereof; and that your orators may have such other and further relief as the case may require: also the writ of subpœna directed to the several defendants before named, in due form of law; and your orators will ever pray, &c.

N. WRIGHT,
Sol. for Complainants.

THE STATE OF OHIO, *Hamilton county, ss:*

I, Daniel Gano, clerk of the court of common pleas in and for said county, do hereby certify the foregoing to be a true copy of the bill in chancery, filed by John Chambers and Mary Chambers, his wife, on the 21st November, eighteen hundred and twenty-three, in the court of common pleas of said county, against James Taylor, Nicholas Longworth, and others, which is now pending in said court; and I further certify, that depositions have been taken in said cause, and that the answer of James Taylor has been filed to said bill; all which are on file.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 2d day of July, 1829.

DAN'L GANO, *Clerk.*

Agreement.

"Memorandum of an agreement between Gen. James Taylor, of the one part, by his agent, James T. Eubank, and Nicholas Longworth, of the other.

Said Taylor has sold the said Longworth a part of his lot on the east side of Main street, in Cincinnati, and north of the lot occupied by Harman Long. The number of the lot, on the plat of the town, is eighty-one. The part now sold commences at a point on Main street, forty feet from the northwest corner of the lot; thence south-

wardly, on Main street, to the southwest corner of the lot, supposed to be about fifty-nine feet; thence eastwardly, on the line of the lot, one half its depth, supposed to be ninety-nine feet; thence northwardly, on a line parallel to Main street, to within forty feet of the northern boundaries; thence westwardly, on a line parallel to the southern boundary of the lot, to Main street, to the beginning corner. The price is one hundred and twenty-five dollars per foot in front, whatever on measurement it shall hold out: one-third payable on signing this contract; one-third in six months; and the remaining third in twelve months. A deed of general warranty in fee simple to be made by the said Taylor to him, Longworth, in the course of three months; and a mortgage given on the premises to secure the remaining payment.

Witness our hands and seals, at Cincinnati, this 5th April, 1814.

(Signed) JAMES TAYLOR, [SEAL.]
Test: By JAMES T. EUBANK, *Att'y in fact.*
N. LONGWORTH. [SEAL.]

Endorsed—"Rec'd April 5th, 1814, twenty-four hundred and and fifty-eight $\frac{33}{100}$ dollars, supposed to be about the first payment.

(Signed) JAMES T. EUBANK,
(A copy.) For JAMES TAYLOR."

(A Copy.)

"*July 5th*, 1815.

Received three hundred and three dollars 40 cents, int. on this contract, up to this date.

"JAMES TAYLOR."

"Interest of the within debt is paid up to the 31st December, 1817, Feb'y 20th, 1818.

"JAS. TAYLOR."

Interlocutory decree at July term, 1829.

Whereupon "this cause came on to be heard on the bill, answers and exhibits, and was argued by counsel; on consideration whereof the court order and decree that this cause be referred to Master Commissioner Hunt, with direction to take an account of the amount of the purchase money and interest; the amount paid by the complainant to the respondent, and of the amount of rents and profits received by said respondent since the recovery in ejectment by the respondent against the complainant; and report thereof to this court, in order to a final decree.

Continuance.

And this cause was continued.

Leave to withdraw report.

And afterwards, to wit, at the December term of said court, in the year of our Lord one thousand eight hundred and twenty-nine, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and thirty, "On motion leave is granted the complainant to withdraw the report made by the master commissioner in chancery, and filed in this cause."

Interlocutory decree at Dec. term, 1829.

And afterwards, in this same term, to wit, on the eighth day of January, in the year of our Lord one thousand eight hundred and thirty, "come the parties by their counsel, and the bills of the complainant, the answers of the defendant, the exhibits and depositions, together with the arguments of counsel, being submitted to the court, and the court having deliberated upon the same, it appears to the court now here that the allegations of the complainant's bill are true, and that the equity of the case is with the said complainant, and that he is entitled to the relief prayed for in said bill; but inasmuch as it is alleged that no notice was given of the time when the master commissioner in chancery, to whom this cause was referred, to take an account between the parties, would bear evidence touching the said matters of account, it is ordered, adjudged and decreed, that this cause, with the necessary papers and documents, be again referred to the said Master Commissioner Hunt, to take an account between the parties, to hear evidence touching the said account; and in case the said Master Commissioner Hunt shall be unable or refuse to take the said account in a reasonable time during the succeeding vacation of this court, the said matter may be examined by some other master commissioner of this court, with power to take the said account aforesaid. And the final decree in this cause is suspended until the coming in of said report."

Continuances.

And this cause was thereupon continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and thirty, this cause was "continued for report of master."

And afterwards, to wit, at the December term of said court, in the year last aforesaid, this cause was "continued under former rule."

Order at July term, 1831.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and thirty-one, "on reading and filing the report of the master commissioner in this cause, and

the exceptions thereto taken, it is considered by the court that the 6th exception is well taken; and the court do further order that the cause be remanded to the said commissioner, so to amend his report as to allow to the said Longworth no more rents than are raised on that part of the lot which is in controversy between the parties; and that he return said amended report to the next term of this court—and no opinion is given by the court upon the other exceptions; but the same are continued for further consideration."

Continuances.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, this cause was further continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and thirty-two, this cause was further continued.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, this cause was further continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and thirty-three, this cause was further continued.

Order of reference set aside, &c.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, to wit, on the eighteenth day of December, in the year of our Lord one thousand eight hundred and thirty-three, "on motion of Mr. Tibbatts, counsel for respondent, the order of reference heretofore made in this cause is set aside; and the matters referred in said former reference are referred to Crafts J. Wright, as commissioner, with instructions to report thereof at the next term of this court. And this cause is continued.

Further order of Reference, Dec. term, 1833.

And afterwards, in this same term, to wit, on the nineteenth day of December, in the year last aforesaid, "on motion of the respondent, by his attorney, it is ordered that the commissioner appointed in this cause do make out his accounts upon such principles and after such manner as he may be requested by either party."

Continuance.

And this cause was thereupon continued.

Order of Reference, July term, 1834.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and thirty-four, "the master commissioner in chancery, to whom this cause was referred to state

an account between the parties, having made his report, and objections being taken to the same, and the same being considered by the court, it is the opinion of the court that the defendant is not entitled to interest, except at the rate of six per cent., after the commencement of the ejectment suit mentioned in the bill. This cause is therefore again referred to the same master, to state an account between the parties similar to the one reported, with directions to compute interest at the rate of nine and ten per cent. to the commencement of the ejectment suit, and six after; and the papers are ordered to be transmitted to the master. On motion of complainant, leave is given him to amend his bill, by making new parties, if he should deem it advisable."

Continuance.

And thereupon this cause was continued.

Leave to amend Bill.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, "on motion of the complainant, by Mr. Chester, his counsel, the court give the said complainant leave to amend his bill, on the payment of all costs that have accrued since the commencement of this suit. And this cause is continued."

And afterwards, in this same term, to wit, on the twenty-third day of December, in the year last aforesaid, "It is ordered by the court that the costs to be paid by the complainant are all the taxable costs, excluding witnesses fees, taking depositions, and the allowance to the master commissioner. The fees allowed the commissioner to be paid by complainant, and to be provided for in the general decree.

Continuance.

And this cause was continued.

And afterwards, to wit, on the twenty-first day of May, in the year of our Lord one thousand eight hundred and thirty-five, came again the said complainant, by his solicitor aforesaid, and by leave of court here for that purpose first had, amended his said original and supplemental bills to read as follows, to wit:

Bill as amended.

To the Hon. the Judges of the Circuit Court of the United States, sitting within the seventh circuit, in the State of Ohio:

The petition of Nicholas Longworth respectfully showeth, that on or about the day of in the year of our Lord 1815, or near that year, your orator purchased of one James Taylor, of Newport, in the State of Kentucky, (your orator being a resident of Cincinnati, in the State of Ohio,) by and through the authorized agent

of the said James Taylor, one James T. Eubank, since deceased, a part of lot No. 81, in Cincinnati, beginning at the S. W. corner of said lot, on Main street, thence northwardly on Main street fifty-nine feet, and the same width back at right angles, half the depth of the lot, supposed to be one hundred feet; for which your orator was to pay the sum of one hundred and twenty-five dollars per foot in front, and to pay the one-third thereof on signing the written contract, then executed in due form of law, by and between your orator and the said James Taylor, by his authorized agent aforesaid; and the remaining two-thirds in two equal instalments; said instalments were without interest. Your orator cannot now state the date of said contract, nor the periods of payment, with certainty, as he recently forwarded a bill of injunction for allowance to the Hon. C. W. Byrd, Esq., with the written contract annexed, by a special agent, who went to the town of West-Union, under the impression that the Hon. Judge there resided; and on his arrival at West-Union, instead of continuing until he found the said C. W. Byrd, Esq., put the letter in the post office, which enclosed the bill and contract, at said West-Union, to be forwarded to the said C. W. Byrd, Esq. On the return of said messenger, your orator dispatched a second messenger to the Hon. Judge, who returned a few hours since, with information that said letter had not reached him. But said remaining two-thirds were either due in 6 and 12 months or one and two years from the date of said contract. And your orator accordingly, on the execution of said contract, paid the one-third the consideration money, which was entered as a credit on the back of said contract.

And your orator further alleges, that said lot, when bought by him, was in a low, sunken, swampy situation; and that at great expense he filled up the said lot, so as to make it fit for building, and then erected thereon four store-rooms; which, at the high price of materials and workmanship at the time, cost him, if his recollection of the bills be correct, and he thinks he is so, three thousand dollars, besides the cost of some back buildings and repairs since, which cost your orator upwards of one thousand dollars more.

And your orator further states, that said instalments becoming due, and unpaid by your orator, to the said James Taylor, your orator commenced the payment of interest on said balance to the said James Taylor, as the same became due; and after some time the said James required that your orator should pay him either nine or ten per cent. per annum for continued indulgence, which your orator cannot from recollection say positively, and pay the same quarterly; and your orator continued to pay the same for a long period of time, and up to the time of the adverse title being set up, hereafter referred to. Your orator does not set up the allegation of said illegal interest being paid, with a view to claim any ungentlemanly advantage therefrom; on the contrary thereof, he voluntarily agreed to pay the same, is satisfied therewith, and only states it as a reason why the balance of the purchase money was not paid or demanded by said James, and as one of the reasons why he cannot now make time a material part of the

contract, thereby to avoid a specific execution, if it shall appear he has a better title to the premises. And your orator continued to pay the said James said agreed interest, until the latter part of 1819, or the forepart of the year 1820 or 1821; the precise time your orator cannot state, nor the amount of the last payments made, as there was a good understanding between your orator and the said James, and it was sometimes paid to the black boy of the said James, who could give no receipt, not being able to write, and other times to the agent of the said James, and no receipt taken. Your orator particularly remembers a payment to a Mr. Barry, now deceased, of two hundred dollars, a relation and agent of the said James, for which he has no order or receipt, but he presumes the books of the said James will show the several payments.

Shortly after this time, one Stephen Burrows informed your orator, as purchaser under said James, and, as your orator understood, to charge him with notice, that there was a better title to said lot No. 81, than the said James's, in one Chambers and wife, and that he was about to have the same put in suit, as soon as he could collect the facts and evidence. The said James, some time thereafter, brought an action of ejectment against your orator, in your hon. court, to eject your orator, or rather the tenants of those in possession claiming under him, from the premises, which your orator considered unjust and unreasonable, so long as a cloud rested on the title of the said James; which premises your orator had bought from him under assurances that the same was clear and indisputable; and that he could make your orator an unencumbered title, free from litigation, was your orator's inducement to the purchase. Your orator nevertheless proposed to the said James, to avoid litigation, to pay the costs that had accrued on said ejectment—pay one thousand dollars in hand, and one thousand dollars per year, till the balance due him was discharged, without waiting the decision on the title of the said James; and risk the responsibility of the said James to repay him for money paid, improvements, interest, &c. in case of a failure of title; which proposition the said James refused.

And your orator further alleges that a bill has been some time filed in one of the State courts in this county, by Chambers and wife, against the said James and your orator, to recover the said lot, and which bill the said James has not yet answered, although it has been long pending; but is now, as your orator is advised, about to make a motion after great delay, to move the same to your hon. court.

And your orator further charges, that on being informed by him, Burrows, of said intended suit, he called on the counsel of said Chambers and wife, and asked him what were his candid impressions on the subject; whether he, said Chambers and wife, had the better title or not; or whether your orator would be safe in paying said Taylor the balance due him pending said Chambers' claim. The application being confidential, and the person the particular friend of your orator, he knew he would give his opinion candidly. Your orator was advised by said counsel he had no doubt of success, and

that your orator would be unsafe in paying the balance of consideration money.

And your orater further charges, that anxious if possible to lead to some amicable arrangement, he some months since called on the said James and requested a statement of the balance claimed by him, telling the said James that for some payments he had no receipts, and depended on his honor; but the said James refused to make any statement or inform your orator of the balance claimed by him. Your orator then called on D. K. Este, Esq., the attorney of the said James, told him of his application and its refusal, and required him to furnish the acc. of the balance claimed, and requested him to endeavor to obtain the same from the said James, but has to this hour been unable to obtain it.

Your orator further alleges, that the said James, at the last term of your hon. court, obtained a judgment in said action of ejectment, your orator having no remedy at law, and has taken out his writ of possession to eject the tenants holding under your orator, from the buildings, &c., erected by your orator at great expense.

And your orator further alleges, that he recently proposed to the attorney of the said James, rather than be driven to his bill in chancery, he would endeavor, if the said James would wait a few days, to make arrangements to pay the balance due, and depend on the ability of the said James in case of a failure of title, so much was your orator averse to litigation; but the attorney informed your orator he did not believe the said James would receive the money; and after seeing the said James, informed your orator he refused all terms, but insisted on possession under his ejectment. Your orator had also, previous to said last proposition, proposed to pay one or two thousand dollars in hand, and one thousand dollars yearly, till the claim of said Chambers was decided; and as soon as the same was settled, that he would pay the whole balance due. This was in like manner refused.

And your orator prays that the said James Taylor may be made a defendant to this his bill—all of which actings and doings of the said James Taylor are contrary to equity and good conscience, and greatly tend to the injury of your orator. In tender consideration whereof, as your orator has no remedy at law, he prays the aid, benefit and interference of your honorable court, where matters of this nature are properly cognizable; to the end, therefore that the said James Taylor and his confederates, when discovered, may full, true and perfect answers make to all and singular the several allegations of this bill, and that in as full and ample a manner as if he were specially interrogated thereto. And that he may with like precision declare what were the terms of said contract; what the amount paid in hand and entered on the back of said contract; what each and every subsequent payment made on said acc.; whether said James has not a statement of the same on his books, or some other memorandums thereof; and if so, that he produce them, or a copy thereof; whether he does not remember, among the last of the payments, a

sum of two hundred dollars paid his relation, Mr. Barry; whether his servant, Reuben, and others, did not sometimes get money by his directions; whether your orator did not agree with him to allow him unusual interest, and pay him quarterly for indulgence. How long said contract existed; when made; what the per cent. was; how much it amounted to quarterly, and how much the gross amount; whether your orator did not write to him in 1820, or thereabouts, at the eastward, in substance as stated; if not, to what purport; whether his answer was not as stated; if not, of what purport, and what his impression and belief, when his memory does not certainly serve him; whether your orator did not make the several proffers of accommodation aforesaid, and risk his responsibility for repayment; whether your orator did not require a statement of the balance in the court of common pleas in this county, or elsewhere, some months since, stating as aforesaid alleged; and whether he did not refuse to furnish a statement of the amount claimed; whether he has not recently said he would not even take the balance due and guarantee the title; whether the title to be made by contract was not one of general warranty; and your orator expressly charges such to have been the fact, with a special answer to each and every other matter and thing set forth.

And your orator prays, on a final hearing, if it shall appear that the title of said property is not in the said James, and that he cannot make your orator a valid title for the same, that he may be compelled to repay your orator all moneys paid him, with interest from the time of payment, all sums paid for improvements, with interest thereon from the time of expenditure, taxes and other incidental expenses, after deducting therefrom a reasonable compensation for the use of said ground, from the time of purchase, which would leave the said James in your orator's debt, in a larger sum by far than the balance now due him, and more than your orator believes the premises would now command in money; and was your orator under no contracts, he would prefer the abandonment of the contract to its specific performance, as most advantageous. But should it appear the said James can make a valid title, in pursuance of his contract, your orator prays a specific execution of the same on such terms and times as to your honors shall seem equitable, to enable your orator to comply with his engagements, and compel the said James to do what in equity and good conscience he is bound to do. May it please your honors to grant your orator a writ of injunction, enjoining the said James Taylor, his agents, attorneys, the marshal, his deputies and all others, from further proceedings in said ejectment or the eviction of the tenants, till your further order be shown; and your orator prays said injunction may continue till the final hearing, when, if it shall appear that the said James has a valid title, he prays a decree for a title; but if it shall appear he can make no title to your orator, that your orator may be decreed to render up the premises, on the receipt of the sum that shall be due your orator on the settlement, and not before such other and further relief as on trial may

seem just and equituble. And your orator, as in duty bound, &c. May it please your honors to grant your orators the writ of subpœna, &c, directed, &c., and your orator, as in duty bound, will ever pray, &c.

STATE OF OHIO, CITY OF CINCINNATI, *County of Hamilton.*

Personally appeared before me, the undersigned, Nicholas Longworth, of lawful age, and being duly sworn deposeth and saith, that the facts in this bill contained are true, so far as he states of his own knowledge, and so far as he relies on the information of others, and states therefrom, he believes them to be true, &c.

N. LONGWORTH.

Sworn to and subscribed before me, Sept. 6, 1824.

[SEAL.] In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the city of Cincinnati, the day and year aforesaid.

ISAAC G. BURNETT, *Mayor.*

Supplement as amended.

"To the Honorable the Judges of the Circuit Court of the United States, sitting within the seventh circuit, in the State of Ohio.

The supplemental bill of Nicholas Longworth respectfully represents that heretofore, to wit, in the month of June, eighteen hundred and twenty-five, your petitioner filed in your honorable court a petition, on the chancery side thereof, setting forth, among other things, that some time in the year 1815, your petitioner purchased of one James Taylor, of the State of Kentucky, (your orator being a resident of Cincinnati, in the State of Ohio,) a part of lot No. 81, in Cincinnati, beginning at the southwest corner of said lot, on Main street; thence northwardly on Main street fifty-nine feet, and the same width back, at right angles, half the depth of the lot; supposed to be one hundred feet; for which your orator was to pay the sum of one hundred twenty-five dollars per foot, front, and to pay one-third thereof at the time of signing the contract; the remaining two-thirds to be paid in two equal instalments, without interest. And that the said contract, which was made in writing, was lost or mislaid, so that the same could not be obtained by your orator; the terms of said contract could not be stated with precision, nor the date; and that your orator paid to said Taylor, at the time of executing said contract, $, being one-third of the consideration money, which had been endorsed on the back of said contract. That your orator had expended in improving said lot more than $4000; and when the remaining two-thirds of the purchase money for said lot became due, your orator commenced paying interest on said balance of purchase money, which was continued to be paid by your orator and received by said Taylor up to the time

that an adverse title to the premises was set up; and a part of the time he was required to pay, and did pay, nine or ten per cent. interest for the use of said money, which said Taylor agreed to receive, and did receive, up to the latter part of 1819, and give further time for the payment of the principal. The amount paid must in a great measure depend on the disclosure of Taylor, as your orator had not kept an account of the payments, except as stated in the original bill. That shortly after this time, your orator was informed, for the purpose of charging him with notice, that there was a better title to said lot 81, than the said Taylor's, in one Chambers and Chambers, his wife; on which claim there was a suit in chancery brought in Hamilton common pleas court, which was still pending. That said James soon thereafter brought an action of ejectment against the tenants holding under your orator, to obtain possession of said lot; that your orator made other preparations, as therein stated, for the payment of said money, and would have paid the whole of the money in hand to said Taylor, but for the dispute in the title; and your orator was advised by counsel that the adverse title of said Chambers and wife to said lot was the better title, and must succeed, and that your orator would be unsafe in paying the balance of the purchase money. That your orator finally, to have the business closed, called on said Taylor, and requested a statement of the balance of money claimed by him, telling him that for some payments he had no receipts, and depended on his honor; and that a similar call was made on D. K. Este, Esq., the attorney of said Taylor, but had always been refused; and your orator found it impossible to obtain any account of the balance due; but the said James went on with his ejectment, and had taken out his writ to get possession of said premises. That even after this, your orator proposed again to pay the balance of the purchase money in hand, and depend on the ability of said James to repay, in case of failure of title; but that said James has refused all terms, and insists on the possession of the premises. Your orator had before, several times, proposed to enter into any arrangement that might be satisfactory, by paying a part of the money in hand, and the residue whenever the title should be settled. Your orator also, in his said original bill, called on James Taylor, the defendant therein named, to discover, under his oath, and fully answer the matters and things in said bill contained, and especially what were the terms of said contract; what payments had been made; and whether he did not receive unusual interest for further time for payment of said purchase money; what the per cent. interest was quarterly, and what the gross amount; and whether certain letters were not written on the subject of the payment of said money, and what was the purport of such letters; and whether your orator did not make the several offers of accommodation aforesaid; and whether your orator did not require a statement of the balance due; and whether said Taylor did not refuse to furnish a statement of the amount claimed; and whether he had not lately said he would not even take the balance due, and guarantee the title; whether by the contract aforesaid was

not for a deed of general warrantee. And your orator prayed in his said bill, that on final hearing thereof, if it should appear that the title to the said property was not in the said James, and that he could not make a valid title for the same, that he might be compelled to repay to your orator the amount paid on account of said purchase, together with expenses of improvement and taxes, and other expenses relating thereto, with interest, deducting therefrom a reasonable sum for the use of the same. But if it should appear to your honors that the said James could make a good and valid title for the same, then your orator prayed a special execution of the contract, on such terms and times as to your honors should seem equitable; and that your honors would compel the said James to do what in equity and good conscience he was bound to do. And your orator also prayed for an injunction to restrain said James from obtaining possession of said premises until the matters could be heard in your court of equity. Which original bill was duly sworn to on the 6th day of Sept. 1824; and to which bill the said James Taylor filed his answer, setting forth that said contract was made on the fifth day of April, 1814, for the lot aforesaid, the amount of purchase money being $7,406 25, one-third of which was paid in hand, and complainant put in possession of the lot; a deed of warranty was to be made to Longworth in three months, and a mortgage taken to secure the residue of the purchase money—to wit, half in six, and the remainder in twelve months. Said answer also admits that said Longworth paid an unusual interest on said balance up to 31st Dec. 1817. Said answer admits payments made on account, over and above the one-third, as follows:

1815, July 5, - - - - -	$303 40
1817. In'st up to October 31st, not recollected.	
1818, April, - - - - -	100 00
Sept. 30, - - - - -	81 00
1819, July 21, - - - - -	150 00
Aug. 18, - - - - -	100 00
Sept. 2, - - - - -	120 00
	$854 40

That said Taylor brought suit in September, 1822, to complete said contract or put an end to it; that pending said ejectment, said Longworth made several propositions to make a new contract for the payment of the balance due, which the said James refused to make, but at all times declared his readiness to accept the balance of the purchase money and interest, and make a conveyance; that in July, 1824, he obtained judgment on his ejectment, and in August took possession of the premises. That in 1823 one Chambers and wife set up an equitable title to said lot, and commenced a suit in chancery therefor; that said James had been in peaceable possession since 1793, having obtained a deed in 1798; that improvements made on said lot are of little value, and that if an account were taken of pay-

ments, improvements, rents and profits, said Longworth would fall in debt; and finally, that said Longworth, having neglected to comply with his contract for a number of years, cannot require a specific execution thereof; that a court of equity cannot direct an account of purchase money, improvements, rents and profits, under a contract put an end to by the refusal of the party to comply with the same; and said answer prays to be dismissed, &c. But before replication filed, or issue taken in the suit aforesaid, your orator has discovered, and now charges the fact to be, that said James Taylor, with the sole and only purpose of defrauding your orator out of the benefit of his purchase aforesaid, has himself so conducted the business as to create the delay himself, in order that your orator might be induced to defer the final payment of the residue of the purchase money, until he could take such steps as would amount in his opinion to a disaffirmance of the contract, and he be able to hold all the money he has received, with interest on the residue up to 1820, or 1821, and then secure the whole property; and your orator charges, that to effect this purpose he first changed the contract, so far as to the time of payment, and gave an extension in consideration of receiving the same interest that bank stock paid at the time; and your orator charges that he did receive such extravagant and high interest on the whole sum, down to March 31st, 1819, as appears by his receipt, which your orator has discovered since filing his original bill: said interest was, your orator thinks, nine per cent., which, from the time said payments became due, up to the said 31st March, 1819, would amount to $1919 00, or about that sum; and your orator has discovered, since filing said bill, that he paid said Taylor, in

July, 1819, - - - - - -	$150
18th August, 1819, - - - - -	100
Sept., 1819, - - - - -	120
and he has Taylor's receipt for - - - -	100
Paid August 24, 1819, making - - - -	$470

over and above the interest, up to March 31st, 1819, which, if applied to interest only, which your orator charges the fact to be, it appearing as well from the answer of said Taylor, as the voucher remaining now in your orator's hands, would pay the interest on the purchase money due on said contract, up to October 31st, 1820. Your orator believes there have been still further payments made, but with all his care he has not been able to discover any others; but again calls on said James Taylor to answer under oath whether the payments in this supplemental bill named were or were not made, and whether any other were made; and when and what sums.

And your orator further charges, that said Taylor did not make out said deed within three months, and tender it to your orator; nor has he ever made or tendered a deed to your orator, and demanded his money; on the contrary, he agreed to receive the interest and full satisfaction for delay, up to Oct., 1820; and from that time to the

time he brought his suit in ejectment aforesaid, he was amusing your orator by negotiating the business; and he purposely delayed the final trial of the suit with Chambers and wife, in order to leave a shade over the title to intimidate your orator, and induce him to suspend payments; and he, said Taylor, has not, until very lately, answered said bill, nor has he yet permitted the same to come to a final hearing.

And your orator further charges, that since filing the aforesaid bill and answer, discovering the matters set forth in this supplemental bill, and wishing to put the question at rest, again placed in the hands of Samuel Lewis, his attorney, a sum of money, amounting to more than $8000, with directions to call on said Taylor and tender him the amount due, whatever that sum might be, and demand a deed for the premises aforesaid; and your orator is informed and believes that said Lewis did, about the fifth day of July, 1827, go to the house of the said Taylor, and request him to state the amount due from your orator, taking that sum of money with him, and offering to pay the same, or so much as should be found due to said Taylor, on an exhibition of his accounts; but that said Taylor absolutely refused to receive any part of the money or make a deed as aforesaid, or treat in any manner on the subject; and your orator has now the money, whatever it may amount to, say $———, ready to pay to said Taylor, as this court shall direct, on receiving a deed from said Taylor, with the usual covenants, according to the contract; to the end, therefore, that the said Taylor may be compelled to answer the matters and things herein before charged, by way of supplement, and that he may be compelled to answer and state fully what amount of rents he has received from said since he took possession thereof. And on a final hearing of this case may it please your honors to grant and award such a decree as from the circumstances of the case your orator shall be entitled to.

SAMUEL LEWIS,
Att'y for Compl't.

Continuance.

And afterwards, to wit, at the July term of said court, in the year last aforesaid, this cause was continued.

And afterwards, to wit, on the twenty-second day of December, being in the term of December, in the year last aforesaid, came again the said James Taylor, by Charles Fox, Esquire, his solicitor, and filed in court here his answer to the said amended bill, as follows, to wit:

Answer to amended Bills.

7TH CIRCUIT COURT OF THE UNITED STATES.

JAMES TAYLOR
ads.
NICHOLAS LONGWORTH. } In chancery.

The answer of James Taylor to the amended bill of Nicholas Longworth, exhibited against the said James Taylor.

This respondent, for answer to so much of said amended bill as was contained in complainant's original bill, and to which respondent has already made answer, he refers to and adopts his said original answer, as an answer to said amended bill. And for further answer to said amended bill, respondent says that he has been informed and believes, and so charges the fact to be, that on the twelfth day of December, in the year eighteen hundred and fifteen, said complainant, by deed duly executed, a copy of which is hereto attached, and made a part of this answer, mark A, transferred and conveyed ten feet off the usoth side of the lot so alleged to have been purchased of respondent, and said Mears took possession of said lot.

He also has been informed and believes, that long prior to the institution of the ejectment suit, by respondent, referred to in complainant's bill, said complainant sold to one David Griffin, by contract in writing, thirty feet off of the north part of said lot, and that he placed said Griffin in possession thereof.

He has been further informed and believes, that long before the institution of said ejectment suit, said Longworth had sold to Thomas D. Carneal the remainder of said lot so purchased, and had transferred to said Carneal the possession of said premises.

And respondent has also been informed and believes, that the said Carneal, and Griffin, and Mears, at the time of the commencement of said ejectment suit, by themselves or their tenants, were in the actual possession of said premises, so purchased by said Longworth of respondent, and they claimed to be the owners of said premises.

Respondent therefore insists that said complainant, at the time of commencing this suit, had no beneficial interest in the property in controversy, and is not entitled to the relief prayed for in his said bill.

He further insists, that inasmuch as said Mears, Longworth, and Griffin are not parties to this suit, the cause ought not to be decided; they being necessary parties to a final termination of the controversy.

Respondent further insists, that he is a resident of the State of Kentucky, and was so at the time of commencing this suit, and he denies the jurisdiction of this court to investigate and determine the matters in controversy in this cause. And having answered, he prays hence to be dismissed, with his costs.

THE STATE OF OHIO, *Hamilton county.*

The above named respondent, being sworn, states that the facts set forth in the foregoing answer are true, so far as stated from his own knowledge, and so far as stated from information he believes them to be true. JAS. TAYLOR.

Sworn to and subscribed before me, this 16th day of December, 1835. E. HARRISON,
Justice of the Peace.

Exhibit.

The exhibit referred to in the foregoing answer is as follows, to wit:

A.

This indenture, made the twelfth day of December, in the year of our Lord one thousand eight hundred and fifteen, between Nicholas Longworth and Susan his wife, of the one part, and John Mears of the other part, witnesseth, That the said Nicholas Longworth, for and in consideration of the sum of twenty-two hundred and fifty dollars, lawful money of the United States, to him in hand well and truly paid by the said John Mears, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said John Mears, his heirs and assigns, forever, all that certain piece of ground in the town of Cincinnati, on the east side of Main street, commencing at the southwest corner of lot number eighty-one, thence northwardly on Main street ten feet, and the same width back on parallel lines, (the southern boundary of the lot being one hundred feet,) and all the estate, right, title, interest, claim, and demand of the said Nicholas Longworth, of, in and to the said premises hereby bargained and sold, and every part thereof; together with all and singular the rights, members, privileges and appurtenances to the same belonging, or in any wise appertaining; and the rents, issues and profits thereof: to have and to hold the premises aforesaid, hereby bargained and sold, or meant or intended so to be, with the appurtenances, to the only proper use and behoof of the said John Mears, his heirs and assigns, forever. And the said Nicholas Longworth, for his heirs, executors and administrators, doth covenant, grant, and agree, to and with the said John Mears, his heirs, executors, administrators and assigns, that he is the true and lawful owner of the premises hereby granted, and hath good right, full power, and lawful authority to sell and convey the same, in manner and form aforesaid: and further, that he, the said Nicholas Longworth, his heirs, executors and administrators, will warrant and forever defend the aforesaid premises, with their appurtenances, and every part and parcel thereof, unto the said John Mears, his heirs

and assigns, against all persons claiming or to claim by, from or under him, them, or any them, or by, from or under any other person or persons whomsoever. In witness whereof, the said Nicholas Longworth, and Susan his wife, have hereunto set their hands and affixed their seals, the day and year first above written.

N. LONGWORTH, [SEAL.]
SUSAN LONGWORTH. [SEAL.]

Sealed and delivered in presence of us:
JOHN MAHARD,
JABEZ LONGWORTH.

STATE OF OHIO, *Hamilton county, ss:*

Before me, the undersigned, a justice of the peace within and for the said county, came personally Nicholas Longworth, and Susan his wife, the above named grantors, who severally acknowledged the above deed of conveyance to be their voluntary act and deed, for the uses and purposes therein mentioned; and the said Susan being first examined, apart from her said husband, to ascertain if her relinquishment of dower was free and voluntary, in pursuance of the statute in such case made and provided. In testimony whereof I have hereunto set my hand and affixed my seal, this thirteenth day of December, in the year of our Lord one thousand eight hundred and fifteen. JOHN MAHARD, *J. P.* [SEAL.]

Rec'd April 3d, 1816—Recorded 22d April, 1816.

THE STATE OF OHIO, *Hamilton county, ss:*

I, Griffin Yeatman, recorder, within and for the county aforesaid, do hereby certify that the foregoing transcript is correctly copied from book P, page 51, Ham. County Records.

[L. S.] In testimony whereof I have hereunto set my hand and seal of office, this 15th December, A. D. 1835.

GRIFFIN YEATMAN,
Recorder, Ham. county, Ohio.

Continuance.

And thereupon this cause was continued.

Continuance and leave to amend Bill.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and thirty-six, this cause was "continued, with leave to amend bill."

Continuance.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, this cause was continued.

Continuance.

And afterwards, to wit, at the May term of said court, in the year of our Lord one thousand eight hundred and thirty-seven, this cause was further continued.

Leave to amend, &c.

And afterwards, to wit, on the 25th day of December, in the year last aforesaid, "on motion of the complainant, by his solicitor, leave is given him to amend his bill by to-morrow morning—and the question of costs is reserved by the court."

And afterwards, in this same term of December, in the year of our Lord one thousand eight hundred and thirty-seven aforesaid, "came the complainant by his counsel, and files his amended and supplemental bill," which is in the words and of the terms following, to wit:

Amended and Supplemental Bill.

"To the hon. the judges of the circuit court of the United States, in and for the district of Ohio, in chancery sitting:

The amended and supplemental bill of Nicholas Longworth, complainant, against James Taylor, respondent, leave for filing the same having been first obtained. Your orator now, and at the time of filing his said original bill, a citizen and resident of the State of Ohio, by way of matter amendatory to the said original bill, filed by your orator against the said James Taylor, then and still a citizen and resident of the commonwealth of Kentucky, begs leave further to represent unto your honors: that after your orator had purchased the lot named in said original bill from the said Taylor, your orator made and entered into three several agreements, for the sale and disposal of the same, as follows, to wit: on or about the 12th day of December, A. D. 1815, your orator sold, and by deed of general warranty conveyed ten feet of the said lot to one John Mears, then, and ever since a citizen and resident of the State of Ohio; on or about the month of , in the year 1822, your orator entered into a written agreement with one David Griffin, then and ever since a citizen and resident of the State of Ohio, by which your orator, upon the performance of certain conditions, was bound to convey in fee simple thirty feet of said lot to said Griffin, with covenants of general warranty; on or about the 9th of May, A. D. 1815, and after your orator's said purchase from said Taylor, your orator entered into a like written agreement with one Joseph Canby, by which your orator, upon the performance of certain conditions, was bound to convey in fee simple twenty feet, being residue of said lot, to said Canby, with covevenants of general warranty; and the said Canby, on or about the 7th day of December, A. D. 1818, assigned the said agreement, and all his interest in the said twenty feet to one Thomas D. Carneal, now a citizen and resident of the State of Ohio; and afterwards, on

the 23d of September, 1818, your orator, by a special endorsement on said written agreement, ratified the same, and bound himself to make the said Thomas D. Carneal, or his heirs, a deed of general warranty, in fee simple, for the said twenty feet of land; which said agreement, and the said endorsement thereon, are still outstanding against your orator; and he holds himself bound to make such general warranty deed to the said Carneal so soon as your orator shall obtain the legal title therefor from the said Taylor.

And your orator further represents, by way of matter supplementary to his said original bill, that on or about the 30th day of January, A. D. 1829, your orator, in consequence of the litigation in regard to said lot, was unable to comply with his said agreement with the said David Griffin, and on or about the day last mentioned, your orator and the said Griffin entered into another agreement in regard to the thirty feet so sold as aforesaid to said Griffin; by virtue of which last mentioned agreement the said first agreement was cancelled and held for nought; and the said Griffin then and there released all his right, interest and claim to the said thirty feet, to your orator, and which said thirty feet has ever since been the right and property of your orator—the said Griffin, having no interest, legal or equitable, in the same.

And your orator further represents, by way of matter supplementary to his said original bill, that on or about the 16th day of June, A. D. 1829, your orator, in consequence of the litigation in regard to said lot, not having a good title, and being unable to confirm the same in a manner satisfactory to the said John Mears, (who had long before been turned out of the possession, as charged in said original bill,) your orator and the said Mears entered into another agreement in relation to the said ten feet, so sold to him as aforesaid by your orator; by virtue of which the said Mears afterwards, and on or about the 16th day of June, A. D. 1829, by his deed duly executed and delivered, released and conveyed all his right, interest and claim of, in, and to the said ten feet to your orator; and which said ten feet has ever since been the right and property of your orator—the said Mears having no interest, legal or equitable, in the same. And your orator insists, that by the principles and usages regulating the practice of courts of equity, the said Carneal, Mears and Griffin ought not to be made parties to this suit; and, as your orator is advised, cannot be made parties defendants thereto, without ousting this court of its jurisdiction. Your orator, therefore, prays that the said defendant, upon his corporal oath, may full, true, and perfect answer make to all and singular the matters herein set forth and charged, and that he may have such other and further relief as he is entitled to in equity and good conscience.

By WILCOX & CHASE,
his Solicitors.

Rule for answer.

And thereupon, "on motion the respondent was ruled to answer in ninety days—and this cause was continued."

Continuance.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and thirty-eight, this cause was further continued.

Continuance.

And afterwards, to wit, on the twenty-second day of December, in the year last aforesaid, being in the term of December, in the year of our Lord one thousand eight hundred and thirty-eight, came again the said respondent, by Charles Fox, Esquire, his counsel, and filed his answer to the said amended and supplemental bill, which said answer is in the words and of the tenor following, to wit:

Answer to Amended and Supplemental Bill.

JAMES TAYLOR
ads.
N. LONGWORTH.

The respondent, for answer to the amended and supplemental bill, filed by *respondent*, says he admits the allegations of said complainants, as to his having repurchased the several portions of said premises, alleged to have been sold to John Mears and David Griffin; but he insists that Israel T. Canby and Thomas D. Carneal *is* a necessary party to this suit; and that without making said Carneal a party to the cause, no decree can be had in the premises; and he insists that there is a want of proper parties to this suit. He therefore prays said bill may be dismissed.

CHA'S FOX,
Att'y for Respondent.

Endorsed on said answer is an agreement as follows, to wit: "It is agreed to receive the above answer without oath.

S. P. CHASE, *for Compl'ts.*"

And afterwards, in this same term of December, to wit, on the twenty-sixth day of December, in the year last aforesaid, came again the said complainant, by P. B. Wilcox, Esquire, his solicitor, and filed in court here his replication to the answer of the said respondent, which said replication is in the words and of the tenor following, to wit:

Replication.

"LONGWORTH *vs.* TAYLOR. } In chancery.

And the said Longworth comes and says, that the matters and things set forth in his said bill and amended bill, are true, in substance and in fact; and that the matters and things set forth in the answer of the said Taylor, contrary thereto, are untrue; and this he is ready to make appear, as by this honorable court shall be directed.

By WILCOX, *his Sol'r.*"

Evidence.

The following depositions and exhibits were used as evidence in this cause, to wit:

Depositions.

Depositions of William McLaughlin and others, at Dec. term, 1830.

"CIRCUIT COURT OF THE UNITED STATES, *Seventh Circuit, and District of Ohio.*

NICHOLAS LONGWORTH *vs.* JAMES TAYLOR. } In chancery.

Before Samuel F. Hunt, master commissioner in chancery for the court aforesaid, at his office in Cincinnati, on the twenty-second day of November, eighteen hundred and thirty, personally appeared William McLaughlin, of lawful age, who, being duly affirmed according to law, testified, deposed, and on his solemn affirmation declared and said: That from the 27th day of October, 1824, to the first of September, 1827, he charged the respondent for repairs to the building he now occupies, on part of lot eighty-one, in Cincinnati, forty-five dollars and eighteen cents, which sum was allowed on deponent's settlement with the respondent. Deponent thinks the greater portion of this sum was expended during the first year—say thirty-five dollars. Deponent further saith, that from the first day of September, 1827, the respondent agreed to deduct ten dollars per annum from his annual rent, for repairs, to be put on the building he now occupies; and further he saith not.

WM. McLAUGHLIN.

Upon fur ther examination, the deponent saith, that the rent he annually paid was paid monthly, and that generally in advance; and he believes that Tutwilder paid his rent in the same manner.

WM. McLAUGHLIN.

Deposition of O. Owens.

At the same time and place, and before Samuel F. Hunt, master commissioner in chancery for the court aforesaid, at his office in Cincinnati, personally appeared Owen Owens, of lawful age, who, being duly sworn according to law, on his solemn oath declared and said: That on the second day of November, eighteen hundred and twenty-six, he was allowed by the respondent four dollars and forty-two cents, for repairs made to the building he now occupies, in dispute between the parties, which was deducted from his rent; and further he saith not.

O. OWENS.

Upon further examination, this deponent further saith, he sometimes paid his rent three or four months in advance, and that at other times he was one or two months in arrear; but he believes it would average a payment monthly during the year.

O. OWENS.

Deposition of D. Tutwiler.

Before Samuel F. Hunt, master commissioner in chancery for the court aforesaid, at his office in Cincinnati, on the twenty-sixth day of November, 1830, personally appeared David Tutwiler, of lawful age, who, on his solemn oath, declared and said: That from the first day of September, 1827, to the 1st day of January, eighteen hundred and thirty, he expended in repairs on the buildings he now occupies, the sum of fifty-three dollars and thirty-one cents, which was allowed to this deponent on his settlement with the respondent; and further this deponent saith not.

D. TUTWILER.

Deposition of G. L. White.

Before Samuel F. Hunt, master commissioner in chancery, at his office in Cincinnati, on the fourteenth day of December, 1830, personally appeared George L. White, of lawful age, who, being duly sworn according to law, deposeth and saith: That he is in partnership with Enos Woodruff, Esquire, who has occupied one of the tenements now in dispute between the parties to this suit; and he thinks that the contract to pay rent was monthly, and that the payments were equal to that; and further he saith (not.)

GEORGE L. WHITE.

Deposition of J. Myers.

Before Samuel F. Hunt, master commissioner in chancery for the court aforesaid, at his office in Cincinnati, on the 15th day of December, eighteen hundred and thirty, personally appeared John

Myers, of lawful age, who, on his solemn oath, declares and says: That during the years eighteen hundred and twenty-five and six, and part of the year 1827, he lived on a part of inlot number eighty-one, but not on that part of it in dispute, and that he paid the amount of tax in the receipts marked AA and BB, for James Taylor, but whether it was the tax due on the whole lot or for that particular part on which respondent lived, this deponent does not know. And further he saith not.

JOHN MYERS.

I, Samuel F. Hunt, master commissioner in chancery for the court aforesaid, do hereby certify that the several depositions of William McLaughlin, O. Owen, D. Tutwiler, G. L. White, and John Myers, which appear on the foregoing pages, were severally taken, sworn to, and subscribed, before me, at the respective times and places therein mentioned, by consent of the parties to the suit.

Given under my hand, at Cincinnati, this 16th day of December, 1830.

SAM'L F. HUNT,
M. C. in Chancery.

Vouchers.

The vouchers marked AA and BB, referred to in the foregoing deposition of John Myers, are as follows, to wit:

AA.

"Rec'd, Cincinnati, Jan'y 21, 1826, of James Taylor, by the hand of J. Myers, twenty dollars, in full for corporation tax for 1825.

JONAH MARTIN, *C. C.*"

BB.

"$33 90. Rec'd, Cincinnati, Feb'y 6th, 1827, of J. Taylor, by J. Myers, thirty-three dollars $\frac{90}{100}$ in full for corporation tax for 1826.

JONAH MARTIN, *C. C.*"

Depositions of William Oliver and others, filed July term, 1831.

7TH CIRCUIT COURT OF THE UNITED STATES, *Ohio District.*

JAMES TAYLOR
ads.
NICHOLAS LONGWORTH. } In chancery.

The above complainant and his attorneys will take notice that, on the sixth day of July, in the year eighteen hundred and thirty-one, the above defendant will take the depositions of William Oliver, Samuel R. Miller, and others, before Thomas Henderson, judge of

the court of common pleas of Hamilton county, State of Ohio, at the office of Storer and Fox, in the city of Cincinnati, county of Hamilton, State of Ohio, between the hours of eight o'clock, A. M. and five o'clock, P. M. on said day, at which time and place the said complainant can attend and cross-examine said deposition, to be read on the trial of the above cause.

CHARLES HAMMOND, and
STORER & FOX,
Attorneys for Def't.

July 2d, 1831.

7TH CIRCUIT COURT OF THE UNITED STATES, *Ohio District.*

JAMES TAYLOR
ads.
NICHOLAS LONGWORTH.

Be it remembered, that on this sixth day of July, A. D. one thousand eight hundred and thirty-one, at the office of Storer & Fox, in the city of Cincinnati, pursuant to the enclosed notice, between the hours of eight o'clock, A. M. and five o'clock, P. M. the following depositions were taken in the above cause, to be used in evidence, before me, Thomas Henderson, one of the associate judges of the court of common pleas in and for the county of Hamilton, in the State of Ohio.

Deposition of William Oliver.

William Oliver, of said city, after been duly cautioned and sworn, (he being of lawful age,) deposes and says: That he has resided in Cincinnati since the year 1819; that he has dealt some in real estate, and has had opportunity of judging of its value. He believes that property in the lower part of Cincinnati (that is, on Main street) was considerably higher in 1819 than in 1824. And further this deponent saith not.

WILL. OLIVER.

Sworn to and subscribed this 6th day of July, 1831.
THOMAS HENDERSON, *A. J. H. C.*

Deposition of O. Lovell.

At the same time and place appeared Oliver Lovell, of said city, who is of lawful age, and, being duly cautioned and sworn, deposes and says: That he has been a resident of Cincinnati for the last eighteen years now past, and has dealt some in real estate in Cincinnati, and does consider himself somewhat of a judge of its value; and without hesitation he says that property on the lower part of

Main street was much higher in the year 1819 than in 1824; that is, in value. And further he says not.

OLIVER LOVELL.

Affirmed to and subscribed before me, this 6th day of July, 1831.

THOMAS HENDERSON, *A. J. H. C. O.*

Deposition of Jonah Martin.

Also, at the same time and place, came Jonah Martin, of lawful age, who also being duly examined, cautioned and sworn, deposes and says: That he has been a resident of Cincinnati for about thirty-seven years past, and has had some knowledge of the value of real estate in said Cincinnati, from his purchases and otherwise: he is clearly decided, from his recollection, that property below the hill, on Main street, would have sold for a much higher price in the year 1819 than it would in 1824; and further, he believes that at this time property so situated as aforesaid will sell for double the amount that it would have done in the year 1824. And further this deponent saith not.

JONAH MARTIN.

Sworn to and subscribed before me, this 6th day of July, A. D. 1831. THOMAS HENDERSON, *A. J. H. C.*

Deposition of E. Woodruff.

Also, at the same time and place, personally came Enos Woodruff, of lawful age, who being duly examined, cautioned, and sworn, deposes and says: That he has been a tenant, occupying fifteen feet of the south part of the premises in dispute, since the year of 1817. Deponent thinks he paid, for a short time after he took the premises, at the rate of two hundred and fifty dollars per year; thinks he then paid two hundred per year for 1 or 2 years; it was then reduced to one hundred and fifty dollars per year. At what time it was reduced to $150, does not recollect; thinks as early as 1820; at which rate he continued to pay until 1825. Further this deponent saith not.

ENOS WOODRUFF.

Sworn to and subscribed before me, this 6th day of July, A. D. 1831.

THOMAS HENDERSON, *A. J. H. C.*

Deposition of D. Griffin and others, filed July term, 1837.

7TH CIRCUIT COURT UNITED STATES, *in and for the Ohio District.*

JAMES TAYLOR
ads.
NICHOLAS LONGWORTH.

The complainant and his attorney will take notice that, on the 19th day of April, 1837, the said defendant will take the depositions of David Griffin and others, to be used as evidence on the trial of the above cause, at the office of Charles Fox, in the city of Cincinnati, county of Hamilton, in the State of Ohio, before Wm. Doty, a justice of the peace, or other competent authority, between the hours of eight o'clock, A. M. and five o'clock, P. M. on said day, to be continued from day to day, between the same hours, if not all taken on the first day named.

CHARLES FOX,
April 12th, 1837. *Sol. for def't.*

STATE OF OHIO, *Hamilton county, ss.*

To any Constable of Cincinnati township, greeting:

You are hereby commanded to summon David Griffin, John Mears, Daniel Hrnoe, and Enos Woodruff, to appear before me, William Doty, a justice of the peace for said township, at the office of Charles Fox, Esq. on Third street, on the 19th day of April, 1837, at 11 o'clock, A. M. on said day, to give testimony, and the truth to say, in a cause now pending in the 7th circuit court, United States, in and for the Ohio district, in chancery, wherein Nicholas Longworth is plaintiff, and James Taylor defendant. Hereof fail not, under the penalty of the law; and have you there this writ.

Given under my hand and seal, this 14th day of April, A. D. 1837.

WILLIAM DOTY, *J. P.* [SEAL.]

Return—"Served personally, and by copy, David Griffin, Enos Woodruff, and Daniel Horne—John Mears not found.
April 19th, 1837. E. V. BROOKS, *Const.*"

Deposition of E. Woodruff.

7TH CIRCUIT COURT OF THE UNITED STATES, *Ohio District.*

JAMES TAYLOR
ads.
NICHOLAS LONGWORTH. } In Chancery.

The depositions of Enos Woodruff and others, taken at the office

of Charles Fox, in the city of Cincinnati, on Wednesday, the nineteenth day of April, 1837.

Enos Woodruff, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith.

Question by def'ts attorney.—Please state who was the person of whom you first rented the shop you have heretofore testified to having occupied in this cause, and how many different landlords you paid rent to during the period of your occupancy. State who was your landlord at the time possession was delivered to Gen. Taylor, under the habere facias writ issued in an ejectment suit brought by Taylor, in the 7th circuit court of United States, in the Ohio district?

Answer.—I rented the premises in question in eighteen hundred and seventeen or eighteen, from John Mears. The lot was fifteen feet front on Main street, ten feet of which only said Mears claimed to own. The other five feet was claimed by Thomas D. Carneal, as I was informed both by said Mears and Carneal. I, however, rented from Mears, and paid all the rents to him, until James Taylor was put in possession of the premises by writ of habere facias, sometime about the year 1824; since which time I occupied the same premises under said Taylor as landlord, and accounted to him for the rent until the fall of 1835.

ENOS WOODRUFF.

Deposition of Daniel H. Horne.

At the same time and place came Daniel H. Horne, who, being duly sworn, says:

Question by respondent.—Please state what you know about who owned the lot or any part of the inlot numbered eighty-one, in the original plat of Cincinnati, or any part thereof; state what part of it was owned by John Mears, and when he became the owner of it?

Answer.—Some time between the years eighteen hundred and fourteen and twenty, Nicholas Longworth had possession of sixty feet off the south part of lot 81, and built three houses on the same. Shortly after the erection of said houses, John Mears bought of said Longworth ten feet off the south side of said lot, and held possession for five or more years; and Thomas D. Carneal exercised ownership over twenty feet joining the north line of the piece owned by said Mears.

By same.—Please state how long Mr. Mears continued to own said lot—and whether he now owns it to your knowledge?

Answer.—Mr. Mears possessed the property until he was dispossessed, by process, of it by Mr. Taylor's suit; it remained in that way, until when Mr. Mears wanted to erect a building on the lot, about the years 1828 or '29, when Mr. Longworth paid back the purchase money to Mr. Mears. The said Mears previously called on Longworth to perfect the title, for he had already made him a deed, which he stated he could not do.

By same.—Please state what you heard N. Longworth say about his having sold any portion of said lot to Thomas D. Carneal?

Answer.—I never heard him say any thing about it. The only way in which I knew that Carneal claimed the lot was, that I collected rent for five feet of the part owned by him, and paid him over the same.

DANIEL H. HORNE.

Questions by N. Longworth. Do you know that John Mears abandoned his purchase and returned it to me, and from what cause? State fully all you know.

At the time John Mears purchased of N. Longworth, ten feet of ground of the south part of lot eighty-one, I was either in his employ as foreman of his business, or in partnership in said business with him, and for years after, and to this date are considerably acquainted with his business. John Mears bought the ten feet above named adjoining him, to make his lot large enough to build two stores. Shortly after the purchase from Longworth a claim was brought by some person against said lot eighty-one, and one day in conversation with Stephen Burrows, I learned from him that he had full knowledge of said claim, and that he believed that said claim would take the whole lot. Sometime afterwards Mr. Mears was dispossessed of the premises by a writ, and James Taylor placed in possession of the same. The property then remained in possession of said Taylor, until Mr. Mears was ready to build; at which time I had frequent conversations with Mr. Mears relative to the ten feet of ground, and he appeared to be very anxious to have his title perfected, so that he could build his stores as he contemplated when he made the purchase. He stated that he had seen Mr. Longworth, and that Mr. Longworth was willing, in case that Mr. Taylor would give him, said Mears, possession, that Mr. Mears should pay either Taylor or Longworth for the same, or to pay the person in whose favor the suit then pending should be decided, and that he had seen Mr. Taylor, and he refused to come into any agreement, but stated that the property was very good, and he would keep it, and he would not part with it. When Mr. Mears found that he could in no way get a title, and he could not delay his building, having considerable part of the materials on the ground, he concluded to go on with his buildings and give up the ten feet, which he did, and said Longworth paid him back the purchase money with interest. I have, since the buildings have been up, frequently heard Mr. Mears say, that he was obliged to spoil his building by not getting the ten feet purchase of Mr. Longworth, and that he ought to have had damages from the said Longworth, *from the said Longworth* for the disappointment; and I believe that had Mr. Mears not had his materials on the ground, that he would have delayed his building until the suit was determined.

DANIEL H. HORNE.

Deposition of D. Griffin.

At the same time and place came David Griffin, who, being duly sworn, deposes and says:

Question by respondent's counsel. Please state what you know about who owned the south part of inlot 81, in the City of Cincinnati; if you ever owned any part thereof, state what portion of it of whom you purchased, when, and for what price you purchased, and whether you received any written contract, and how long you continued?

Answer. Some time in the year 1822, I bought of N. Longworth 30 feet of the aforesaid lot, for the sum of six thousand dollars in current paper at that time, and that I had possession of said property until dispossessed by some process by Gen. Taylor, sometime about the year 1824; and that about the 20th of January, 1829, Mr. N. Longworth paid me back the purchase money that I had paid him thereon; it appearing uncertain whether the said Longworth would or would not be able to make me a good deed for the same. There was some papers passed between Mr. Longworth and myself at the time of the purchase in relation to a title, but whether an article or a title bond, I cannot say; but whatever papers may have been passed, was given up on the settlement in 1829, between Mr. Longworth and myself. The 30 feet of said lot that I bought of Mr. Longworth was north of property reported to be owned by Thomas D. Carneal; at least this I understood from Mr. Carneal; said property claimed by Mr. Carneal was on the south part of lot 81, on Main street.

D. GRIFFIN.

Question by N. Longworth. Do you know the reason which induced me to cancel my contracts of sale, or did you understand the reason why I had not paid Taylor, and perfected my sales?

Answer. As to the reason that induced Mr. Longworth to cancel his contracts in relation to lot 81, I cannot say, but I was told by Mr. Burrows that he had a claim of some women which was in suit for lot No. eighty-one, covering the property that I had bought of Mr. Longworth; and I heard Mr. Longworth repeatedly say, about the time of my settlement with him, that the reason he did not comply with his contract with Genl. Taylor, was that Genl. Taylor could not make him a good title, in consequence of this claim of Mr. Burrows, or that he was agent for.

D. GRIFFIN.

I, William Doty, a justice of the peace within and for Cincinnati township, Hamilton county, and State of Ohio, do hereby certify that Enos Woodruff, Daniel H. Horne, and David Griffin, *was* by me sworn as witnesses, to testify the truth, the whole truth, and nothing but the truth, in the above-named cause. And that the foregoing depositions, by them subscribed, the answers *was* reduced to writing by

myself or the witness signing the same, at the office of Mr. Charles Fox, Esqr. agreeably to the enclosed notice hereunto attached, between the hours of 8 o'clock, A. M. and 5 o'clock, P. M. of said day.

Given under my hand and seal, this 19th day of April, A. D. 1837.

WILLIAM DOTY,
Justice of the Peace. [SEAL.]

THE STATE OF OHIO, HAMILTON COUNTY, *ss.*

I, William H. Harrison, clerk of the court of common pleas, within and for said county, do hereby certify that William Doty, before whom the above depositions of Enos Woodruff, Daniel H. Horne, and David Griffin appear to have been taken, was, at the time of taking the same, and now is, an acting justice of the peace in and for said county, duly commissioned and qualified; and to all his official acts as such full faith and credit are due and ought to be given.

In testimony whereof I have hereunto set my hand, and [L. S.] affixed the seal of our said court, at Cincinnati, this 16th day of May, A. D. 1837.

WM. H. HARRISON, *Clk.*
By JAS. S. SNIDER, *Depty.*"

SEVENTH CIRCUIT COURT, UNITED STATES,
Ohio District.

"NICHOLAS LONGWORTH *vs.* JAMES TAYLOR. } In Chancery.

Deposition of Daniel H. Horne and others, at December term, 1837.

Some time in the year eighteen hundred and thirteen or fourteen, John Mears purchased of Nicholas Longworth ten feet of ground off the south side of lot eighty-one, on the east side of Main street in the city of Cincinnati, bought by said Longworth of James Taylor; said Mears at that time owned, and still owns, thirty-one feet of the north side of lot eighty, joining the above ten feet. The ten feet were purchased by said Mears for light for his coppersmith and tin shop, which was likely to be interrupted by a building then erecting on said lot; and likewise, with reference to enlarging his lot sufficiently large for two stores at a future time. He received, at the time of purchase, a warrantee deed of N. Longworth, and was put in possession of the premises, and held possession until he was dispossessed by James Taylor's ejectment from Columbus. In the winter of 1826 and 27, John Mears made arrangements to put up two stores, each twenty feet front, and put a considerable part of the material on the ground during that winter. John Mears informed me that he had an interview with Longworth, and urged him to get him possession of his

ground; that he thought he could get it in the spring, but he afterward found that nothing could be done for him by Longworth, in time for his buildings, that must go on that spring. John Mears then went to James Taylor and proposed to him that if he would give him possession of the ten feet, he would enter into an agreement to pay said Taylor for the ground, provided the suit then pending between him and N. Longworth was terminated in his favor. Taylor replied, that the ground was his, and he would not sell one foot of it. In the spring John Mears went on, and erected his buildings, one eleven feet, and one twenty feet. Mears frequently complained of the loss he sustained in not being able to get the ground to erect his store, as was originally intended by him. Sometime afterwards said Mears gave back the ground to Longworth, and gave him a quit claim for the same. I was, at the time of the purchase, in the employment of John Mears, and at the time the building *were* erected was in partnership with him, and was intimately acquainted with his general business.

Question by atty. for Genl. Taylor. Please state how long, as near as you can recollect, after Mr. Mears was ejected, was it before the contract was rescinded on the part of Mr. Mears and Mr. Longworth?

The quit claim from John Mears was executed on the 17th day of June, 1829, but the agreement for relinquishing said ground was made sometime after said Mears completed his building, which was during the summer of 1827.

DANIEL H. HORNE.

STATE OF OHIO, CITY OF CINCINNATI.

Personally appeared before me, Sam'l W. Davis, mayor of Cincinnati, Daniel H. Horne, who being sworn saith, the facts in this deposition stated are true to the best of his recollection.

In testimony whereof, I have hereto set my hand and
[SEAL.] the seal of said city this 8th Dec'r, 1837, at my office in said city.

SAM'L W. DAVIES, *Mayor.*

Deposition of Thomas D. Carneal.

NICHOLAS LONGWORTH *vs.* JAMES TAYLOR } Circuit Court of the U. S., Columbus, Ohio.

On the 9th of May, 1815, Joseph Canby purchased of Nicholas Longworth, as will be seen by their contract of that day, a lot of ground on the east side of Main street, in the town of Cincinnati, (being a part of a lot he purchased of Gen. James Taylor; beginning on the north side of a piece of ten feet, sold to Mears, and on which the store now occupied by Ruffin & Oliver stands); thence northwardly on Main street twenty feet, and the same width back on

parallel lines half the depth of the entire lot, to wit, one hundred feet. On the 9th of May, 1817, Joseph Canby endorsed on the contract he had paid N. Longworth three thousand two hundred and eighty-two dollars principal, and the interest thereon *upon* to that day; and on the seventh day of September, 1818, he, Canby, assigns Thomas D. Carneal, this deponent, all his right, title, interest, and claim in said lot, and acknowledges his responsibility to N. Longworth on the purchase. Under this endorsement, and assignment to Carneal from Canby, Nicholas Longworth makes the following statement: "I will make Thomas D. Carneal or his heirs a deed of general warranty in fee simple for the within property, Sept. 23, 1818—N. Longworth." From the 23d of Sept. 1818, this deponent received the rents, to the time of Gen. Taylor's taking possession of the same by some court process. From that day to the present time, this deponent has been anxiously waiting the termination of the controversy between Taylor and Longworth, with expectation of getting the lot if Longworth was successful, and has not during the whole of that period received one cent either from Canby or Longworth, in way, rent or interest, or a dollar of the principal paid by him to Israel T. Canby, which was five thousand one hundred dollars.

This deponent would remark that Israel T. Canby had previously purchased the lot of Joseph Canby, and paid him for it; and that the assignment to him from Joseph Canby was upon the order of Israel T. Canby. This deponent would further state, that at the time he made the purchase he knew of no claim Gen. Taylor had against the lot, and that he made the purchase in full confidence he would get a title as agreed to be made by N. Longworth.

TH. D. CARNEAL.

STATE OF OHIO, CITY OF CINCINNATI, *ss:*

Personally appeared before me, Sam'l W. Davies, mayor of Cincinnati, Tho. D. Carneal, who being sworn, saith, the facts in this deposition stated are true, to the best of his recollection.

In testimony whereof, I have hereto set my hand and
[L. S.] seal of our said city, this 8th Dec. 1837.

SAM'L W. DAVIES, *Mayor*.

Deposition of D. Griffin.

NICHOLAS LONGWORTH *vs.* JAMES TAYLOR. } U. States Circuit Court of Ohio. Bill for specific performance.

David Griffin states, that he bought of N. Longworth 30 feet front of the property in controversy, east side Main street, between Columbia and lower Market street, on which there was two frame stores; and went into possession under a contract of said Longworth, to make him a good title; this he was bound to do by a written agreement between them. Sometime afterwards he was ejected by the

ground; that he thought he could get it in the spring, but he afterward found that nothing could be done for him by Longworth, in time for his buildings, that must go on that spring. John Mears then went to James Taylor and proposed to him that if he would give him possession of the ten feet, he would enter into an agreement to pay said Taylor for the ground, provided the suit then pending between him and N. Longworth was terminated in his favor. Taylor replied, that the ground was his, and he would not sell one foot of it. In the spring John Mears went on, and erected his buildings, one eleven feet, and one twenty feet. Mears frequently complained of the loss he sustained in not being able to get the ground to erect his store, as was originally intended by him. Sometime afterwards said Mears gave back the ground to Longworth, and gave him a quit claim for the same. I was, at the time of the purchase, in the employment of John Mears, and at the time the building *were* erected was in partnership with him, and was intimately acquainted with his general business.

Question by atty. for Genl. Taylor. Please state how long, as near as you can recollect, after Mr. Mears was ejected, was it before the contract was rescinded on the part of Mr. Mears and Mr. Longworth?

The quit claim from John Mears was executed on the 17th day of June, 1829, but the agreement for relinquishing said ground was made sometime after said Mears completed his building, which was during the summer of 1827.

DANIEL H. HORNE.

STATE OF OHIO, CITY OF CINCINNATI.

Personally appeared before me, Sam'l W. Davis, mayor of Cincinnati, Daniel H. Horne, who being sworn saith, the facts in this deposition stated are true to the best of his recollection.

In testimony whereof, I have hereto set my hand and
[SEAL.] the seal of said city this 8th Dec'r, 1837, at my office in said city.

SAM'L W. DAVIES, *Mayor*.

Deposition of Thomas D. Carneal.

NICHOLAS LONGWORTH
vs.
JAMES TAYLOR. } Circuit Court of the U. S., Columbus, Ohio.

On the 9th of May, 1815, Joseph Canby purchased of Nicholas Longworth, as will be seen by their contract of that day, a lot of ground on the east side of Main street, in the town of Cincinnati, (being a part of a lot he purchased of Gen. James Taylor; beginning on the north side of a piece of ten feet, sold to Mears, and on which the store now occupied by Ruffin & Oliver stands); thence northwardly on Main street twenty feet, and the same width back on

parallel lines half the depth of the entire lot, to wit, one hundred feet. On the 9th of May, 1817, Joseph Canby endorsed on the contract he had paid N. Longworth three thousand two hundred and eighty-two dollars principal, and the interest thereon *upon* to that day; and on the seventh day of September, 1818, he, Canby, assigns Thomas D. Carneal, this deponent, all his right, title, interest, and claim in said lot, and acknowledges his responsibility to N. Longworth on the purchase. Under this endorsement, and assignment to Carneal from Canby, Nicholas Longworth makes the following statement: "I will make Thomas D. Carneal or his heirs a deed of general warranty in fee simple for the within property, Sept. 23, 1818—N. Longworth." From the 23d of Sept. 1818, this deponent received the rents, to the time of Gen. Taylor's taking possession of the same by some court process. From that day to the present time, this deponent has been anxiously waiting the termination of the controversy between Taylor and Longworth, with expectation of getting the lot if Longworth was successful, and has not during the whole of that period received one cent either from Canby or Longworth, in way, rent or interest, or a dollar of the principal paid by him to Israel T. Canby, which was five thousand one hundred dollars.

This deponent would remark that Israel T. Canby had previously purchased the lot of Joseph Canby, and paid him for it; and that the assignment to him from Joseph Canby was upon the order of Israel T. Canby. This deponent would further state, that at the time he made the purchase he knew of no claim Gen. Taylor had against the lot, and that he made the purchase in full confidence he would get a title as agreed to be made by N. Longworth.

TH. D. CARNEAL.

STATE OF OHIO, CITY OF CINCINNATI, *ss:*

Personally appeared before me, Sam'l W. Davies, mayor of Cincinnati, Tho. D. Carneal, who being sworn, saith, the facts in this deposition stated are true, to the best of his recollection.

In testimony whereof, I have hereto set my hand and
[L. S.] seal of our said city, this 8th Dec. 1837.

SAM'L W. DAVIES, *Mayor*.

Deposition of D. Griffin.

NICHOLAS LONGWORTH *vs.* JAMES TAYLOR. } U. States Circuit Court of Ohio. Bill for specific performance.

David Griffin states, that he bought of N. Longworth 30 feet front of the property in controversy, east side Main street, between Columbia and lower Market street, on which there was two frame stores; and went into possession under a contract of said Longworth, to make him a good title; this he was bound to do by a written agreement between them. Sometime afterwards he was ejected by the

marshal, at the suit of James Taylor; and about two years after this ejectment Longworth returned him the purchase-money, and the contract was cancelled, as the suit in chancery was undecided with Longworth and Gen. Taylor.

Question by counsel for Gen. Taylor.—Please state whether the 30 feet you purchased of Mr. Longworth was on the north side of Carneal's lot?

Answer.—It was.

D. GRIFFIN.

STATE OF OHIO, CITY OF CINCINNATI, *ss:*

Personally appeared before me, Sam'l W. Davies, mayor of Cincinnati, David Griffin, who, being duly sworn, saith, the facts in this deposition stated are true, to the best of his recollection.

In testimony whereof I have hereto set my hand and
[L. S.] seal of said city, this 8th December, 1837.

SAM'L W. DAVIES, *Mayor.*

"It is agreed that the depositions of Thomas D. Carneal, David Griffin, and Dan'l H. Horne, may be used in evidence on the trial of the cause within mentioned, and all matters of form waived.

CHA'S FOX,
Attorney for Defendant."

"B, A copy of a contract, Longworth and Canby."

Depositions of Thos. D. Carneal and others, at July term, 1838.

Memorandum of an agreement between Nicholas Longworth of the one part and Joseph Canby of the other. Said Longworth has sold said Canby a lot of ground on the east side of Main street, in the bottom, in the town of Cincinnati, (being a part of the lot he bought of Jas. Taylor,) commencing on the north side of a piece of ten feet sold John Mears, (and on which the store now occupied by Ruffin and Oliver stands,) thence northwardly on Main street twenty feet, and the same width back on parallel lines, half the depth of the entire lot, to wit, one hundred feet. The building on the same now occupied by David G. Burnet is to be paid for by said Canby; also the one-third part of the building occupied by Ruffin and Oliver. Said Longworth is to appoint one person and said Canby another, (and if thus two cannot agree, they are to choose a third, and the opinion of two to be binding,) and said Longworth is to lay the bills before them as far as he can procure them, and they are to ascertain and decide what said buildings cost said Longworth, which he is to be paid, together with the price of the lot. Said Canby agrees to pay said Longworth for the aforesaid ground the sum of two hundred dollars per foot, making four thousand dollars, and whatever said buildings shall be ascertained as aforesaid to have cost, to be paid as follows:

said Canby is to give his note at sixty days, for the one-third of same sum at the Mi. Ex. Company, which he is not to be called on to pay faster than one-fifth at the end of each sixty days; said Canby paying the discounts; by which means the whole note will be paid in ten months. For the remaining two-thirds he is to give his negotiable note payable in two and three years; equal payments with interest yearly. A deed of general warranty in fee simple to said Canby and his heirs, to be made on demand, and a mortgage taken to secure the payment. Said Canby is to occupy and possess the one-third of the building now occupied by Ruffin and Oliver, (into which he is about to move,) in conformity to a contract between said Longworth and John Mears, by which said Longworth draws one-third of the rent, and said Mears two-thirds. If said Mears wishes the building moved in less than three years he is to pay the one-third the cost of the building; if it remain three years or upwards, it is to be sold, and said Mears receive two-thirds the price sold for; said Longworth one-third. The above is the contract on the subject. By this contract said Canby is to come into said Longworth's place, as it respects the building held with said Mears; and to receive the benefits arising therefrom. For the performance of the above we obligate ourselves to each other.

N. LONGWORTH, [SEAL.]
JOSEPH CANBY. [SEAL.]

May 9, 1815.

Jonathan Christman, Benjamin Hopkins, and Daniel Stagg, are the men agreed on to ascertain the cost of the buildings.

There has been paid Nicholas Longworth, on account of the above contract, three thousand two hundred and eighty-two dollars of principal, and all the interest which has accrued thereon, up to the 9th May, 1817.

I assign all my interest in the above contract to Thomas D. Carneal, of Kentucky, holding myself responsible to N. Longworth, Esq., for all that may be due him in virtue of said contract, for value received, this seventh day of September, 1818.

JOSEPH CANBY.

"I will make Thomas D. Carneal and his heirs a deed of general warranty in fee simple for the within property. September 23d, 1818.

N. LONGWORTH."

Thomas D. Carneal, of Cincinnati, states, that the above is a copy of agreement between Longworth and Canby, with the assignments thereon referred to in his deposition heretofore taken in the suit between Longworth and Taylor; that he has compared it with the original in his hands. The original agreement is in the handwriting, and is subscribed by N. Longworth and Joseph Canby, he well knowing their handwriting. The assignment was made me by Joseph

Canby in person. The contract stands in full force, and I have now and always have held N. Longworth bound to make a good title, with covenants of general warrantee, since the contract was assigned me on the 7th September, 1818. I am of opinion Joseph Canby resided at Lebanon in this State previous to the year 1815. I know he did before 1818. I believe he now resides on the Little Miami, and has for many years.

TH. D. CARNEAL.

Sworn to and subscribed before me this 9th day of May, 1838.
SAM'L W. DAVIES, *Mayor.*

Deposition of Daniel H. Horne.

NICHOLAS LONGWORTH
vs.
JAMES TAYLOR. } Circuit court U. States, Ohio District.

John Mears I have known since 1813, and from that time he resided in Cincinnati till about the year 1829 or 1830, when he moved to Kentucky. James Taylor and N. Longworth; I have known the former since 1816, and the latter as early as 1813. The latter since that time, and I believe for many years before, has been a resident of Cincinnati, and the former of Kentucky; I am certain since, and I have always understood for many years before.

DANIEL H. HORNE.

Sworn to and subscribed before me this 11th day of May, 1838.
SAM'L W. DAVIES, *Mayor.*

"As attorney for James Taylor I agree the above deposition of Daniel H. Horne, also those of Thomas D. Carneal and D. Griffin attached, may be used in evidence on the hearing of the above cause, in the same manner as though more formally taken; hereby waiving all formal notice, they being first sworn to before some lawful authority.

CHAS. FOX,
Att'y for Taylor.

9th May, 1838.

Deposition of D. Griffin.

NICHOLAS LONGWORTH
vs.
JAMES TAYLOR. } U. States court for Ohio. Bill in chancery.

David Griffin states the document hereto attached, marked G, was executed by me at its date and delivery to N. Longworth, in pursuance of an agreement for cancelling the purchase. By our agreement, N. Longworth was to make me a good title, with covenants of general warranty. I have been a resident of what is now the State of Ohio about forty years.

D. GRIFFIN.

Sworn to and subscribed before me this 9th day of May, 1838.
SAM'L W. DAVIES, *Mayor.*

Voucher.

The document referred to in the foregoing deposition of David Griffin is as follows, to wit:

G.

"CINCINNATI, *Jan.* 30, 1829.

This may certify that, whereas, about the year 1822, I contracted, by writing, with N. Longworth for a lot in Cincinnati, on the east side of Main street, between Columbia and Lower Market streets, now claimed by James Taylor, of Newport, Ky., we have cancelled said agreement, and he has now given me his notes for the sums paid thereon; and when the contract is found it is to be destroyed. He has also paid me my book acc., and all dealings are settled except the notes this day given me.

Witness my hand and seal this 30th January, 1829.

D. GRIFFIN. [SEAL.]

Teste: J. A. MASON.

Rec'd, Jan'y 30, 1829, of Mr. N. Longworth the notes of hand as follows:

1	at 6 mo.	for	$343 33
1	12		353 33
1	18		363 34=$1,060

For D. GRIFFIN,
J. A. MASON.

Deed of Longworth and wife to John Mears.

Exhibits.

This indenture, made the twelfth day of December, in the year of our Lord one thousand eight hundred and fifteen, between Nicholas Longworth and Susan his wife, of the one part, and John Mears of the other part, witnesseth, That the said Nicholas Longworth, for and in consideration of the sum of twenty-two hundred and fifty dollars, lawful money of the United States, to him in hand well and truly paid by the said John Mears, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said John Mears, his heirs and assigns, forever, all that certain piece of ground in the town of Cincinnati, on the east side of Main street, commencing at the southwest corner of lot number eighty-one, thence northwardly on Main street ten feet, and the same width back on parallel lines, (the southern boundary of the lot being one,) one hundred feet, and all the estate, right, title, interest, claim, and demand of the said Nicholas Longworth, of, in and to the said premises hereby bargained and sold, and every part thereof; together with all and singular the rights, members, privileges and appurtenances to the same belonging, or in any wise appertaining; and

the rents, issues and profits thereof: to have and to hold the premises aforesaid, hereby bargained and sold, or meant or intended so to be, with the appurtenances, to the only proper use and behoof of the said John Mears, his heirs and assigns, forever. And the said Nicholas Longworth, for his heirs, executors and administrators, doth covenant, grant, and agree, to and with the said John Mears, his heirs, executors, administrators and assigns, that he is the true and lawful owner of the premises hereby granted, and hath good right, full power, and lawful authority to sell and convey the same, in manner and form aforesaid: and further, that he, the said Nicholas Longworth, his heirs, executors and administrators, will warrant and forever defend the aforesaid premises, with their appurtenances, and every part and parcel thereof, unto the said John Mears, his heirs and assigns, against all persons claiming or to claim by, from or under him, them, or any them, or by, from or under any other person or persons whomsoever. In witness whereof, the said Nicholas Longworth, and Susan his wife, have hereunto set their hands and affixed their seals, the day and year first above written.

N. LONGWORTH, [SEAL.]
SUSAN LONGWORTH. [SEAL.]

Sealed and delivered in the presence of
JOHN MAHARD,
JABEZ LONGWORTH.

THE STATE OF OHIO, *Hamilton county, ss:*

Before me, the undersigned, a justice of the peace within and for said county, came personally Nicholas Longworth, and Susan his wife, the above named grantors, who severally acknowledged the above deed of conveyance to be their voluntary act and deed, for the uses and purposes therein mentioned; the said Susan being first examined, apart from her husband, to ascertain if her relinquishment of dower was free and voluntary, in pursuance of the statute in such case made and provided. In testimony whereof I have hereunto set my hand and affixed my seal, this thirteenth day of December, in the year of our Lord one thousand eight hundred and fifteen. JOHN MAHARD, [SEAL.]

Endorsement.—"Received April 3d; recorded 22d April, 1816, in book P, No. 1, pages 51 and 52.

THOMAS HENDERSON,
Recorder of Hamilton county, Ohio."

Deed, John Mears and wife, to Longworth.

This indenture, made this sixteenth day of June, in the year of our Lord one thousand eight hundred and twenty-nine, between John Mears, and Mary his wife, of the first part, and Nicholas Longworth of the second part, witnesseth, that the said John Mears, for and in

consideration of the sum of one dollar lawful money of the United States to him in hand well and truly paid by the said Nicholas Longworth, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, release, convey and confirm unto said the Nicholas Longworth, his heirs and assigns forever, all that certain piece of ground on the east side of Main street, Cincinnati, between Columbia and Lower Market streets, commencing at the southwest corner of lot No. eighty-one; thence northwardly on Main street, ten feet, and the same width back on parallel lines, (the southern boundary being one,) one hundred feet, being the same lot conveyed to said Mears by said Longworth as per deed on record in book P, No. 1, pages 51 and 52, and the object to revest said title in said Longworth, said Mears not being in any way or manner bound for its validity: and all the estate, right, title, interest, claim, and demand of him the said John Mears, of, in and to, the said premises, and every part thereof; together with all and singular the privileges and appurtenances to the same belonging or in any wise appertaining, and the rents, issues, and profits thereof: To have and to hold the premises hereby bargained and sold, or meant, or intended so to be, with the appurtenances, to the only proper use and behoof of the said Nicholas Longworth.

In witness whereof, the said John Mears, and Mary, his wife, who hereby releases her dower, have hereunto set their hands and seals, the day and year first above written.

JOHN MEARS, [SEAL.]
MARY MEARS. [SEAL.]

Sealed and delivered in the presence of
JAMES FOSTER.
(Witness's name illegible.)

STATE OF OHIO, CITY OF CINCINNATI,
County of Hamilton, ss:

Personally appeared before me, the undersigned, a justice of the peace for said county, John Mears, together with Mary, his wife, the within annexed grantors, and acknowledged this instrument to be their voluntary act and deed; and the said Mary, wife of the said John Mears, being of full age, and having this deed read and explained to her, in an examination separate and apart from her said husband, declared this deed of claim of dower to be her own free and voluntary act, and that the same was not executed from any fear, control or coercion of her said husband.

In testimony whereof, I have hereto set my hand and seal, at Cincinnati, this seventeenth day of June, 1829.

JAMES FOSTER, *Just. Peace.* [SEAL.]

Endorsement.—"Rec'd 1st June, 1829, and recorded in Book No. 32, page 20.

GRIFFIN YEATMAN,
Recorder of Ham. County, Ohio."

"I will admit the due execution of this deed on the trial of the case of Longworth *vs.* Taylor.

CHAS. FOX, *Atty. for Deft.*

9th May, 1838.

Deed, John Mears and wife, to Longworth. (Certified copy.)

This indenture, made the sixteenth day of June, in the year of our Lord one thousand eight hundred and twenty-nine, between John Mears, and Mary his wife, of the first part, and Nicholas Longworth of the second part, witnesseth: that the said John Mears, for and in consideration of the sum of one dollar lawful money of the United States, to him in hand well and truly paid by the said Nicholas Longworth, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents, doth grant, bargain, sell, alien, release, convey, and confirm unto the said Nicholas Longworth, his heirs and assigns forever, all that certain piece of ground, on the east side of Main street, Cincinnati, between Columbia and Lower Market streets, commencing at the southwest corner of lot No. 81, thence northwardly on Main street, teen feet; and the same width back on parallel lines (the southern boundary being one,) one hundred feet, being the same lot conveyed to said Mears by said Longworth, as per deed on record in Book P, pages 51 and 52, and the object to revest said title in said Longworth, said Mears not being in any way or manner bound for its validity; and all the estate, right, title, interest, claim, and demand of him the said John Mears, of, in, and to, the said premises, and every part thereof. Together with all and singular the privileges and appurtenances to the same belonging, or in anywise appertaining, and the rents, issues, and profits thereof. To have and to hold the premises hereby bargained and sold, or meant, or intended so to be, with the appurtenances, to the only proper use and behoof of the said Nicholas Longworth.

In witness whereof, the said John Mears, and Mary, his wife, who hereby releases her dower, have hereunto set their hands and seals, the day and year above written.

JOHN MEARS, [SEAL.]
MARY MEARS. [SEAL.]

Sealed and delivered in the presence of

JAMES FOSTER.

STATE OF OHIO, *City of Cincinnati, ss:*

Personally appeared before me, the undersigned, a justice of the peace for said county, John Mears, together with Mary, his wife, the

within named grantors, and acknowledged the within instrument to be their voluntary act and deed. And the said Mary, wife of the said John Mears, being of full age, and having this deed read and explained to her, in an examination separate and apart from her said husband, declared this deed of alien of dower to be her own free and voluntary act, and that the same was not executed from any fear, control, or coercion of her said husband.

In testimony whereof, I have hereunto set my hand and seal, at Cincinnati, this 17th day of June, 1829.

JAMES FOSTER, *J. P.* [SEAL.]

Recorded 1 July, 1829.

HAMILTON COUNTY, *ss:*

The foregoing transcript is correctly copied from Book No. 32, page 20, Ham. county records.

[L. S.] Witness my hand and seal of office, this 18th November, 1837.

GRIFFIN YEATMAN, *County Recorder.*

Interlocutory Decree, Dec. term, 1838.

And thereupon, to wit, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and thirty-eight, "came the parties, by their attornies, and this cause coming on, to be heard upon the bills, answers, depositions, and exhibits, was argued by counsel; on consideration whereof, the court do find that as between the said Longworth and the said Taylor, the equity of the case is with the complainant, and the court being also of opinion that Thomas D. Carneal, in the amended and supplemental bill mentioned, should be a party to this bill, leave is given to the complainant on his motion to amend his bill, by making the said Carneal a party complainant, to the granting of which leave the counsel for the said defendant objected.

And thereupon, on motion of the complainant, it is ordered that this cause stand referred to C. J. Wright, Esq., as master commissioner, to make his report in the premises, agreeably to the directions of either party. The said defendant, by his counsel, objects to any reference of this cause to a master commissioner. It is also ordered that said amended bill be filed in sixty days, and that the defendant answer the same in sixty days thereafter. The question of costs as to said amendment, and the said reference, is reserved, and this cause is continued.

And afterwards, to wit: on the twelfth day of April, in the year of our Lord one thousand eight hundred and thirty-nine, the following amendment to the complainant's said several bills of complaint was filed in the clerk's office of said court, to wit:

Amendment of Carneal.

"NICHOLAS LONGWORTH
vs.
JAMES TAYLOR. } In Chancery.

Agreeably to the order of the court at its *its* last term, Thomas D. Carneal, a citizen and resident of the State of Ohio, now comes and makes himself a party complainant in this case, and begs leave to be so treated by this court; and prays that his rights may be protected by this honorable court, and he will ever pray, &c.

By WILCOX & CHASE, *his Sol.*"

Agreement.

Endorsed on said amendment and filed therewith is an agreement in the words and of the tenor following, to wit: "It is agreed that this amendment shall be considered as filed in proper time, saving, however, all the other objections in favor of the defendant as to the necessity of serving Taylor with process on the amended bill.

WILCOX & CHASE, *for Compl't.*
CHARLES FOX, *for Def't.*"

And afterwards, to wit: on the thirteenth day of July, being in the July term of said court in the year last aforesaid, came again the said respondent, Taylor, by Charles Fox, Esquire, his counsel, and filed in court here his plea to the said amendment in the words and figures following, to wit:

Plea.

SEVENTH CIRCUIT COURT OF THE UNITED STATES, *Ohio District.*

JAMES TAYLOR
ad's.
NICHOLAS LONGWORTH and THOMAS D. CARNEAL. } In Chancery.

The plea of James Taylor to so much of the bill as amended by the insertion of the name of Thomas D. Carneal as a co-plaintiff with said complainant, Nicholas Longworth.

This defendant, by protestation, not acknowledging the matters and things in and by the said amended bill set forth, for plea to so much of said bill as sets forth that said Carneal has purchased of said Longworth and is now owner of portions of said property alleged to have been sold by this defendant to said Longworth, and so far as the same prays a discovery and relief by said Carneal, says that the said Thomas D. Carneal is a resident in and citizen of the State of Ohio, and the said defendant is an inhabitant and resident of and citizen in the State and district of Kentucky, and that he was not served with

process in this cause at the suit of said Carneal and Longworth on said amended bill, in the district of Ohio. And the said defendant demands the judgment of this honorable court whether he shall be compelled to make any further answer to said amended bill so far as the —— is above pleaded to; all which matters and things these defendants are ready to aver, testify, maintain, and prove, as this honorable court shall order and direct, and said defendant prays to be dismissed with his costs, &c., in this behalf wrongfully sustained.

CHAS. FOX, *Solicitor for Def't.*

Endorsed on said plea and filed therewith is an agreement as follows, to wit: "It is agreed to waive the necessity of any affidavit on the above plea.

WILCOX & CHASE, *for Compl'ts.*"

Report of Master.

And, thereupon, the said master commissioner, to whom this cause was referred at the last term, filed in court here his report, which is in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES, *District of Ohio.*

N. LONGWORTH *vs.* JAMES TAYLOR. } Ch'y.

The master reports to the court that, in pursuance of their decree rendered in this cause at last term, he has carefully revised his former report made in 1834, and brought up the several calculations as to the state of the account between the said Longworth and Taylor from 1834 to 5th July, 1839. He ascertains the account to stand as follows:

Charging Mr. Longworth 9 per cent. interest on the original purchase money to July, 1839, and 6 per cent. interest on the quarterly balances of interest due from him, there remains due from Mr. Longworth, on the 5th July, 1839, the sum of $1,451 22.

Charging Mr. Longworth 9 per cent. interest on the original purchase money, and not charging interest on the quarterly balances, there will be due from Mr. Longworth, on the 5th July, 1839, the sum of $551 40.

Charging 10 per cent. interest to the 2d September, 1822, the time oft he ejectment suit brought, and six per cent. thereafter, there is due to Longworth, 5th July, 1839, the sum of $3,044 30.

Charging 9 per cent. interest to the 2d September, 1822, the time of the ejectment suit, and six per cent. thereafter, there is due to Longworth, 5th July, 1839, the sum of $3,591 96.

Charging 9 per cent. interest to the time when the claim of Chambers and wife was set up, and six per cent. thereafter, making rests

at the times of payment, then there is due Longworth, 5th July, 1839, $4,384 57.

Charging 9 per cent. to September 2, 1819, then crediting Longworth with $470 paid by him, then charging 6 per cent. on several annual amounts of interest and crediting the amounts of rent and necessary disbursements by Taylor at the end of each year, there is due Longworth on the 1st day of July, 1839, $3,144 16.

In this calculation $75 97 is charged for rent for July, 1839—it being supposed that, if complainant obtains a decree, he will be put in possession by 1st August, 1839.

In the above calculation the master has allowed the respondent Taylor all the credits claimed by him, and to the complainant Longworth all those claimed by him, except the payment of $200 claimed to have been made 24th August, 1819, which is rejected.

CRAFTS J. WRIGHT, *Master.*

Depositions at July Term, 1839.

The following depositions were also filed to be read in evidence on behalf of said respondent on the hearing of this cause, to wit:

CIRCUIT COURT UNITED STATES, *Seventh Circuit and District of Ohio.*

JAMES TAYLOR *ad's.* NICHOLAS LONGWORTH. } In Chancery.

Chas. Hammond's deposition.

The deposition of Charles Hammond, taken by consent of parties at his residence in the city of Cincinnati, on the part of the defendant in the above stated cause, on Monday, the 24th of June, 1839, before Flanner Ball, one of the commissioners for said district, to be used as evidence on the hearing of said cause. The said Charles Hammond, of lawful age, being first duly cautioned and sworn, deposeth and saith: I am asked to state the light in which I regarded the claim of Chambers and wife to the lot, part of which is in controversy in this suit upon my first acquaintance with it? My answer is that I considered it of no account. It was, as I thought, hopelessly stale, and my investigations of it satisfied me that it was destitute of all equity. My understanding was that it was generally estimated as frivolous—a forlorn hope speculation in Mr. Burrows, who was the speculating purchaser, and in Mr. Benham, who was counsel for complainant, and understood to be a party in interest also. I am also asked if I have ever heard Longworth converse in respect to the Chambers claim, and what language he held respecting it? Upon that subject my recollections are, that at the commencement of the litigation, Mr. Longworth did not suggest the Chambers claim as a reason for not completing the contract. Subsequently he spoke of

it; but said if a reasonable credit was allowed him for the balance of the purchase money he would take the risk of the Chambers' claim.

C. HAMMOND.

UNITED STATES OF AMERICA, *District of Ohio, ss:*

I, Flanner Ball, a master commissioner appointed to take affidavits, &c., within and for said district, under the laws of the United States, by the honorable the circuit court of the United States within and for the seventh circuit and district of Ohio, do hereby certify that Charles Hammond, having been duly cautioned, was by me sworn to testify the truth, the whole truth, and nothing but the truth, as a witness in the within stated cause; and that the foregoing deposition by him subscribed was reduced to writing by him, and signed by him in my presence, on the twenty-fourth day of June, A. D. 1839, at his residence in the city of Cincinnati. And I further certify that the said deposition was taken by the consent of the parties to be used as evidence on the hearing of said cause, and that I am not of counsel or attorney for either of said parties to said suit, or in anywise interested in the event thereof.

In testimony whereof, I have hereunto subscribed my name and affixed my seal, at the city of Cincinnati, this twenty-fourth day of June, A. D. 1839.

FLANNER BALL, [SEAL.]
Master Commissioner.

CIRCUIT COURT UNITED STATES, *7th Circuit and District of Ohio.*

JAMES TAYLOR
ads.
NICHOLAS LONGWORTH. } In Chancery.

The depositions of Owen Owens, James H. Walker, Thomas Kent, and James Taylor, taken on the part of the defendants in the above stated cause, by consent of parties, on Tuesday the 25th day of June, 1839, before Flanner Ball, a master commissioner of said court within and for said district, at the office of S. P. Chase, Esq., in the city of Cincinnati, to be used as evidence on the hearing of said cause, as certified below:

Deposition of O. Owens.

Owen Owens, of lawful age, being first duly sworn, saith that he resides in the city of Cincinnati. On the 1st of March, 1835, I rented of Mr. Taylor the storehouse on lot No. 81, in the city of Cincinnati, about fifteen feet in front on Main street, for the term of five years, at two hundred and forty dollars per annum. The store was vacant when I rented it, and it had been vacant for some time—some two or three months—can't state the precise time.

Another store, the next door to it, was vacant at that time, but was occupied soon after I moved into mine. The tenant shortly after left, and I believe it changed tenants several times during the years 1835 and 1836. The last tenant that occupied the store next to mine, whose name was Hamilton, removed in 1837, about March in that year. He did very little business, and my son bought his stock, and received from him the transfer of his lease, at the same price he gave. He stated to me the reason that he left was because he could not make his expenses. The property, at the time I took it, was in very bad repair, and I repaired it at my own expense, which was very considerable. The whole now was in the same condition, and the tenants were constantly repairing them, and complaining of their bad condition; and one Cheseldine, who kept a dry goods store in one of the buildings, left the same, and I heard that he said that he would not remain there if he could rent free—that the houses leaked, there being no way for the water to run off the houses. At the time I took the lease, I would not have taken it at all unless I could have got a lease for a term of years, because the expense of improving it was very great. I have laid out on the store leased from Taylor, and on the one assigned me by Hamilton, about one thousand dollars in repairs and improvements. The improvements made last year by myself and son, in making open fronts, &c., amounted to about $300 of the above sum. Considering the situation of the property, the difficulty of obtaining and the high price of insurance, and the necessity of constant repair, I think the rent I now pay to be a fair and full rent. I consider that the rents paid by Kent and Young—as I have been informed by Mr. Taylor that Kent pays $200, and Young 259—considering the condition of the houses, to be a fair rent. The cellar under my store, and I believe those under the whole, are useless.

O. OWENS.

Sworn to and subscribed, this 25th day of June, 1839, before me,
F. BALL, *Commissioner, &c.*

Deposition of James H. Walker.

James H. Walker, of lawful age, being first duly sworn, saith: I have known the property in controversy, and have lived adjoining it since 1829. The first three years after 1829 it was in very bad repair, the roofs were leaking, and the timbers and joists in many places were completely rotten. When Mr. Hamilton took his store in the year 1835 or 1836, he objected to removing there, on account of the great exposure he would incur in repairing it; and I, anxious to induce him to remove in, and to get him into business, advanced him part of the money to make repairs. It cost him about three hundred dollars, of which sum I lent him about one-half. I consider that the rents paid by the tenants now in possession are full and high rents, for the buildings were not tenantable unless the landlords or the tenants made considerable repairs; and as the repairs have gen-

erally been made by the tenants, the rents paid by them were high. Mr. McLaughlin, who kept a dry goods store in one of the buildings, removed from it in 1831 or 1832; he stated to me that his reasons for leaving the property were, that the high price of insurance and the necessity of constant repair, made his rent higher than it would be for improved property. The property occupied by Mr. De Young changed tenants several times during the years 1833–'34 and '35; that occupied by Mr. Owens changed tenants several times previous to 1835 and 1836. It appeared very difficult to get any tenant to remain, on account of the untenantable condition of it. Not one of the houses in the row is now as it was in 1831 and 1832; they have all been changed by the tenants, in some form or other; and I consider them even now in very bad condition. The original depth of the houses was from 25 or 30 feet, and where they have been increased in depth it has been done by the tenants.

JAMES H. WALKER.

Taken and subscribed before me, this 25th day of June, 1839.

F. BALL, *M. Com. &c.*

Deposition of Thomas Kent.

Thomas Kent, of lawful age, being first duly sworn, saith, I removed into one of the stores on the property in controversy in September, 1836. I took a lease on it for three years, at the rate of two hundred dollars per annum. I took it as it was, expecting to make the repairs myself. It was in bad condition, and leaked badly. I immediately laid out thirty dollars, or thereabouts, in repairs. From year to year I have laid out, more or less, until lately, when I laid out about one hundred and fifty dollars, in putting in a new front. At the time I took it there were two persons that were after it; but when they ascertained that the rent was two hundred dollars a year they would not give it, thinking it too high. When I first applied to General Taylor I think he asked me $250, which I refused to give. Afterwards he sent me word by Mr. Williamson that I might have it for two hundred. The floor at that time was in bad order; it was breaking through, and I put in some new joists and new boards to make it tenantable. I would not have taken it at all at that price if I had not got the promise of a lease for some years. The cellar is entirely useless; the water settles there, and makes it very damp whenever it rains; all the water from the roof goes into the cellar, and the plastering is so tender that it has to be propped up.

THOS. KENT.

Taken and reduced to writing by me, and subscribed in my presence, on the 25th day of June, 1839, before me,

FLANNER BALL, *Comm'r, &c.*

Deposition of James Taylor, Jr.

James Taylor, Jr., of lawful age, being first duly sworn, saith, I am the agent of my father, and generally rented the frame buildings on Main street, in Cincinnati, on lot No. 81, now in dispute between my father and N. Longworth, Esq. I have always endeavored to rent said buildings for the best rent I could get for them, considering the decayed condition of them. The said houses, from about 1834, had gone much to decay, having been badly built. In the year 1835 I had difficulty in getting tenants for some of the houses, as they leaked very much, and the floors were rotten. In the beginning of the year 1835 one of the houses now occupied by Owens was vacant for near three months, and deponent could not rent the same until Owen agreed to take it, and repair it at his own expense, provided he could get a lease for five years on the same. I considered this the best plan to save the buildings. I also gave him a lease for the same term on the adjoining house, which also had been vacant several times, on account of the bad state of repair. In the year 1835, within six months, I had several tenants in one building, all of whom left because it was not fit to put goods in. The buildings leased to Young and Kent were in the same bad condition; and, in 1837, when I spoke to them about raising the rent, they were not disposed to pay more than they were paying, alleging that the houses were out of repair, and that they should have to expend money upon them to keep them in order. Prior to 1834 some of these buildings rented for more than they have since that time, because the houses were constantly deteriorating, and could not be rented at as high prices as when they were in a better condition. I always considered that the houses rented for the full amount of their value; if they did not, I have only to say that I got the most I could for them. I think, in every instance, that leases were made by me; I made a reservation that they were to expire when the suit should be decided between Mr. Longworth and my father.

JAMES TAYLOR, Jr.

Taken and reduced to writing by me, and subscribed in my presence on this 25th June, 1839.

F. BALL, *Comm'r, &c.*

UNITED STATES OF AMERICA,
District of Ohio, ss.

I, Flanner Ball, a commissioner duly appointed under the laws of the United States, to take affidavits, &c., within and for said district, do hereby certify, that Owen Owens, James H. Walker, Thomas Kent, and James Taylor, were by me severally sworn to testify the truth, the whole truth, and nothing but the truth, as witnesses in the within stated cause; and that the several depositions by them severally subscribed, were reduced to writing by me, and signed by the several witnesses in my presence, and taken on the 25th June, 1839, at the office of S. P. Chase, Esq., in the city of Cincinnati, by con-

sent of parties to be used as evidence on the trial of said cause. And I further certify, that I am not of counsel or attorney for either of the parties to said suit, or in anywise interested in the result thereof.

In testimony whereof, I have hereunto set my hand and seal, this twenty-fifth day of June, A. D. 1839.

FLANNER BALL, [SEAL.]
Master Commissioner, &c.

Final Decree.

Whereupon, to wit, on the thirteenth day of July, in the term last aforesaid, being the day and year and at the place first herein aforesaid, "came the complainants, and thereupon, the defendant, Taylor, by Mr. Fox his solicitor, appeared for the purpose of objecting to the jurisdiction of this court, and filed his plea accordingly; and the same being set down for hearing, and the court having considered of the said plea, do order the same to be overruled. And, thereupon, this cause coming on to be further heard upon the several bills, amendments thereof, answers, exhibits, testimony on file at the present time, and master's report, as made in pursuance of the order of this court at its last term, and after hearing the arguments of counsel on the part of complainants and defendant, the court do find the equity of the case in favor of the complainant; and do further find that agreeably to the report of the said master, there is due by the said Taylor to the said Nicholas Longworth, the sum of three thousand one hundred and forty-four dollars sixteen cents, calculating interest at 6 per cent. only, from the second day of September, in the year eighteen hundred and nineteen, as appears by the master's report, as per his last mode of calculation, which is adopted and confirmed by the court; and the court overrule all the other modes of calculation made by the said master, and contended for by the defendant, Taylor. And thereupon, it is ordered, adjudged, and decreed, that within sixty days from the rendition of this decree, the said James Taylor pay or cause to be paid to the said Longworth, the said sum of three thousand one hundred and forty-four dollars sixteen cents, with interest thereon, from the first day of July, A. D. 1839, till paid, and that within the same time the said James Taylor, by a good and sufficient deed of general warrantee, convey in fee simple to the said Nicholas Longworth, the premises in said original bill mentioned and described, being the same mentioned and described in the agreement between the said Taylor and Longworth, under date of April 5th, 1814, made an exhibit in this cause; and that on or before the first day of August next, the said Taylor do deliver up to the said Longworth the quiet and peaceable possession of the same premises. It is further ordered that the several reports of the masters, except that made to the present term, not being the basis of this decree as to payments and rents, be withdrawn from the files of this court. It is further ordered that the master be allowed the sum of fifty dollars for his report made to the present term of this court.

It is also further ordered that within ninety days from the rendition of this decree, the said Longworth pay one-half of the costs of this suit, taxed against him for the various amendments made to the bill, and that the defendant, Taylor, pay the other half within the same time. And thereupon, the respondent prayed an appeal to the Supreme Court of the United States, which is allowed on the said respondent filing bond in the sum of six thousand dollars, with Charles Fox as security, conditioned according to law; which bond is filed accordingly. And the said complainants, by their solicitor, waive the issuing and service of process, and acknowledge notice of the perfection of said appeal.

THE UNITED STATES OF AMERICA,
District of Ohio, sct.

I, William Miner, clerk of the circuit court of the United States of America, within and for the seventh circuit and district of Ohio, do hereby certify, that the foregoing is truly taken and copied from the records of said court.

In testimony whereof, I have hereunto subscribed my name, [L. S.] and affixed the seal of said court, at the city of Columbus, this 23d day of October, A. D. 1839.

WM. MINER, *Clerk.*

Opinion of the Court.

This court delivered an opinion in this case at December term, 1829; but on account of a change in one of the members of the court, and a wish expressed by the counsel of the defendant for a re-argument of the case, the court directed it to be re-argued.

The controversy arises on a contract made on the 5th April, 1814, in which the plaintiff purchased from the defendant part of lot 81 in Cincinnati, at one hundred and twenty-five dollars per foot; one third of the purchase money to be paid down, one third in six, and the other in twelve months.

The defendant to execute a deed of conveyance in three months, and the plaintiff agreed to give a mortgage on the premises, to secure the balance of the purchase money.

The purchase money amounted to about the sum of $7,406 25; one third of which was paid at the execution of the contract, and possession was taken by the plaintiff.

The deed was not executed by the defendant, and when the instalment became due he agreed with the complainant to suspend the payments on his paying the rate of interest paid on Miami Bank Stock, which was nine or ten per cent.

This interest was paid up to about the close of the year 1819. The complainant caused to be built four houses for stores on the lot, which cost $4,464 83. In the year 1819, or the beginning of the year 1820, the plaintiff was informed that Chambers and wife had a claim on lot 81 which would be prosecuted, and that the counsel who had investigated it, were of the opinion that the claim was

valid. The complainant was advised by counsel to withhold the payment of the balance of the purchase money until this claim should be settled.

No interest being paid from the year 1819, the defendant, in September, 1822, commenced an action of ejectment, and recovered possession of the premises in August, 1824.

After notice of the claim of Chambers and wife, the plaintiff states that he made various propositions for payment, varying the original conditions, none of which were finally accepted by the defendant, though it seems the plaintiff supposed that he had some grounds to expect, that a payment into the Branch Bank of the United States at Cincinnati, in discharge of a debt due to it by the defendant would be received, and he sold a part of the lot for payments which would meet the requisitions of the Bank. But the purchaser, on account of the interfering claim refused to complete his purchase, and the contract was rescinded.

In the year 1825, the plaintiff filed his bill, praying a specific execution of the contract. Sometime in the following year, Lewis, the agent of the plaintiff called on the defendant, and requested a statement of the amount due, which he informed the defendant the plaintiff was ready to pay; but the defendant refused to converse on the subject, observing that he had possession of the lot and did not wish to part with it.

Sometime in July 1827, the same agent again called on the defendant with upwards of $7000, principally in notes of the Bank of the United States, and tendered the amount to the defendant, and requested him to exhibit a statement of the amount due, he having kept the account of payments; but he refused to give the statement, or receive the money, and said that he relied on his legal rights. No objection was made to the kind of money tendered. Subsequent to this tender a supplemental bill was filed setting forth the facts.

The buildings on the lot rent for a considerable sum annually, which defendant contends indemnified the plaintiff, while he was in receipt of the same for the improvements made, and also for the sum paid on account of the purchase.

Recently the plaintiff has filed another supplemental bill, in which he states, that in the year 1815, he sold a part of the lot to one Joseph Canby, and bound himself to convey it to him in fee simple on the performance of certain conditions. That afterwards, this agreement was assigned by Canby to one Thomas D. Carneal, a citizen of Ohio, which assignment was afterwards ratified by the plaintiff. That this right is still in Carneal, to whom he is bound to make a warranty deed, so soon as he shall obtain a title from Taylor.

Two other sales of parts of lot 81 to other persons, which covered the residue of the lot, are also stated in this supplemental bill; these contracts were afterwards rescinded.

The first question which arises out of these facts is, whether the plaintiff is entitled to a specific execution of the contract.

On the part of the defendant's counsel it is insisted, that the plain-

tiff has been so negligent in the performance of his part of the contract, as to forfeit all his right to a specific execution of it; and a great number of authorities is referred to as sustaining this position.

The leading case of Scott vs. Fields and others, 7 Ohio Rep. 90, 2nd part, is relied on.

In this case a bill was brought for the specific execution of a contract for a tract of land which was to be paid for by instalments, and it was agreed that if the vendor should fail to make payment, in all respects as specified, the payment then made should be forfeited, and that the agreement should be considered null and void.

The instalments were not paid at the time stipulated, and the court held that time was of the essence of the contract, and dismissed the complainant's bill.

In this opinion the court referred to a great number of reported cases, and controvert the rule as laid down by Lord Thurlow that "time is immaterial in contracts."

And the case of Burmington vs. Israel and Kelly, reported in the same vol. 97, is also relied on. In this case the plaintiff purchased of the defendant a lot of ground and gave four several promissory notes, one of which was payable annually.

The note first payable was not paid at maturity, and some days after the failure the defendants stated to the plaintiff, that they considered the contract forfeited or void, and tendered to him his notes, which he refused to receive, and they were deposited in the hands of a third person.

In May 1832, the plaintiff tendered to defendants the amount supposed to be due on the first payment, and in June, 1835, he tendered the balance of the money due on the contract.

The plaintiff, without the consent or knowledge of the defendants, entered upon the lot, and made some improvements on it.

On this state of facts the court dismissed the bill of the complainant, and held that he had been too negligent in the performance of his part of the contract, to call upon the defendants for a specific execution of it.

In the case of Benedict vs. Lynch, 1 John Ch. 370, the chancellor considers very much at large the influence that time should have on a contract.

That case arose out of a contract for the purchase of land, payment for which was to be made by annual instalments. On full payment a deed was to be executed; and it was agreed if the plaintiff failed in the payments, or any of them, the contracts should be void.

The plaintiff took immediate possession of the land and made improvements on it. He failed to make the payments, and between three and four years after the first default, the contract seemed to have been abandoned by the plaintiff, and he agreed to do a certain amount of work on the premises, as tenant within the year. The defendant then sold the land to another person, who consulted with

complainant before he made his purchase. The court dismissed the bill filed by the complainant for a specific performance.

There can be no doubt that the parties may make time of the essence of the contract, and in no case is it to be considered as an immaterial circumstance.

Lord Thurlow, in the case of Gregron vs. Riddle, 7 Ves. 268, intimated, it would seem, that the parties could not make time of the essence of the contract; but there was no decision of this point in the case, and the remarks of his lordship may not have been accurately reported.

It is the province of chancery to relieve against penalties and forfeitures, but it would be strange if this relief were extended against the positive stipulation and understanding of the parties to the contract. This would be, not to give effect to the contract, but to make a new one between the parties, contrary to the terms which they themselves had adopted.

At law, time is always an essential part of a contract; but in chancery the court consider it in connexion with the circumstances of the case. The rule at law is so inflexible as not to admit of any excuse, however strong, for a failure to perform the contract at the time fixed. But it is otherwise in chancery; not that chancery disregards time as immaterial, but, if the party can shew that he has been prevented, by inevitable accident, or by any justifiable excuse from performing his part of the contract at the time stipulated, and the other party has suffered no material injury by the delay, the court will not withhold its aid.

In the case of Lloyd vs. Collett, Lord Loughborough well remarks, that it is a singular head of equity which arises out of one's own neglect. And he calls for a case to shew where *nothing has been done*, by either party, that chancery has not held time as an essential part of the contract.

In most cases the contract has been in part performed, and some hindrances or excuses are alleged for the non-performance of it in full, and out of these circumstances the equity arises.

It may be laid down as a rule established by adjudged cases, and stated in the elementary treatises on the subject, that where a party has failed to execute his part of the contract without a sufficient excuse, and there has been no acquiescence in the delay by the other party, the court will never decree a specific execution of the contract. The party who asks a court to aid him must shew a reasonable diligence, in doing or attempting to do what he agreed to perform. In 1 Ves. 450, Lord Hardwicke says, it is the business of this court to relieve against lapse of time in the performance of an agreement, and especially where the non-performance has not arisen by default of the party seeking to have a specific performance.

Nearly a century and a half ago, in the case of Hays vs. Corgle, 5 Vin. 538, pl. 18, it was held that a person was not entitled to a specific performance who had trifled or shown a backwardness in performing his part of the agreement.

The facts and circumstances of cases are infinitely diversified. No two cases, perhaps, can be found exactly alike in every particular—consequently no general rule can apply with equal force to all cases. And here is a wide scope for the exercise of the judgment of the chancellor. Not that in the exercise of his discretion he may substitute a new rule, but in applying the facts of the case to established principles.

In the case of Hepburn et al. vs. Auld, 5 Cranch, 252, the Supreme Court say, a vendor may compel a specific execution of a contract for the sale of lands, if he is able to give a good title at the time of the decree, although he had not a good title when, by the contract, he ought to have conveyed. And in the case of Pratt et al. vs. Law et al., 9 Cranch, 456, they say, that time is material as to the specific performance of a contract, whenever, from the change of circumstances, a specific performance, such as would answer the ends of justice between the parties, has become impossible.

In the case of Brashier vs. Gratz et al., 6 Wheat., the court say, the general rule is, that time is not of the essence of a contract of a sale; and a failure on the part of a purchaser or vendor to perform the contract on the stipulated day, does not of itself deprive him of his right to a specific performance when he is able to comply with his part of the agreement. But circumstances may be so changed that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time; in such case a court of equity will leave the parties to their remedy at law. And in the same case the court remark, if a bill for a specific performance be brought by one who is himself in default, the court will consider all the circumstances of the case, and decree according to those circumstances.

These views would seem somewhat to relax the rule laid down by Lord Loughborough in the case of Lloyd vs. Cullett. And it will, perhaps, be found that in the decisions of the Supreme Court they have not regarded time, in the specific execution of contracts, when it stands unconnected with controlling circumstances, with the same degree of strictness as has been done in some modern decisions.

And there may be some danger in avoiding the loose expressions of Lord Thurlow, on this subject, of going to the other extreme. We may look more at the letter of the contract than its substance. We may regard a morality so strict in this respect as to be governed by legal technicalities, and substantially cut off this great branch of equitable jurisdiction.

In almost all the modern cases, in which time has been strictly regarded, it was made of the essence of the contract, by the express agreement of the parties—and the language of the decisions combats the idea that this cannot be done.

To hold that the failure of the vendee to pay the purchase money for an hour or a day should of itself authorize the vendor to rescind the contract, would disregard the distinction which has heretofore been made between the action of a court of law and chancery. Not

that the latter has a dispensing power over contracts; but regarding the substance of the contract, as well as its letter, if the chancellor finds that the delay of payment has not operated injuriously to the vendor; that the condition of the parties is the same as when the payment should have been made; that the value of the property has not materially changed; and that the same justice can be done under the circumstances, as if the payment had been made at the time stipulated, chancery will not refuse its aid. And more especially will its aid be given, if the party can assign a reasonable excuse for his default.

In looking into the facts of the case under consideration, it appears that time was not made of the essence of the contract. The times at which the payments were to be made, and the period within which the deed was to be executed, were fixed in the contract; but there was no expression, that a failure in any of these should avoid the agreement. And by the subsequent agreement of the parties the payments were suspended on the plaintiff's paying the amount which was paid on stock by the Miami Importing Company bank, which appears to have been ten per cent. This amount was paid up to about the beginning of the year 1820. And in the forepart of this year, the first default of the complainant occurred. He had entered into the possession of the lot, paid one-third of the purchase money, and expended more than four thousand dollars in improvements. All this was done with the knowledge and presumed approbation of the defendant.

If the ten per cent. interest for forbearance be added to the first instalment, and the amount paid for improvements, the sum advanced by the complainant would exceed nine thousand dollars. This was the position of the plaintiff in the beginning of the year 1820, he having made no default. There was due to the defendant, at this time, a sum less than five thousand dollars of the purchase money.

About this time the plaintiff was informed of the claim of Chambers and wife, and on inquiring of the counsel, in whose hands this claim was placed for prosecution, he was told it would probably be sustained. And he was advised by counsel to withhold further payments until the claim was settled. Sometime after a bill was filed by Chambers and wife, which was pending in 1827, when the agent of the plaintiff offered to pay the defendant the full amount due.

Objection is made to receiving the bill of Chambers and wife in evidence, though duly certified, as it is not accompanied by the answer, and the proceedings of the court, making the complete record. The bill is offered, not to prove its contents, but merely to establish the fact that a bill was filed in the case; and, for this purpose, it is competent.

The dispute as to the title of the lot, connected with other circumstances, is the excuse offered by the plaintiff for withholding further payments. The circumstances of the defendant, as to his ample means to indemnify the complainant on a failure of the title, can have little or no influence on the rights or remedies of the parties growing out of this failure.

Having stated the acts of the complainant up to this stage of the case, we will turn our attention to the acts of the defendant. Within three months from the time the contract bears date, he was bound to make a deed for the lot. But this he failed to do, nor is there any evidence that he offered to execute it.

The first default was committed by the defendant. And how does this affect his rights? Being thus in default, was he in a condition to exact a strict performance of his obligations from the complainant? Until he executed the deed, or offered to execute it could he have called upon a court of equity to decree a specific execution of the contract.

The execution of this deed was not a mere matter of form. On receiving the deed the plaintiff was to execute a mortgage to secure the payment of the balance of the purchase money. This would have changed the relation of the parties. The plaintiff would have stood in the relation of a mortgagor, and been entitled to all the rights which pertain to that relation.

The defendant, as mortgagee, might have enforced his legalrights, but he could not have extinguished the rights of the plaintiff except by a bill to foreclose the equity of redemption. And in such a proceeding a court of equity would have given time for the payment of the money.

The only excuse set up for not executing this deed, is, that the plaintiff did not prepare the deed and tender it to the defendant. This is the rule in England, but it has not been considered the rule in this country. It is not the understanding of the parties. The vendor binds himself to make a deed, and it is his duty to make it.

Besides, the exact quantity of ground seems not to have been ascertained by the contract; and the price was fixed at one hundred and twenty-five dollars per foot. It was the duty of the defendant, before he made the deed to ascertain the number of feet by actual measurement. The defendant has no excuse for this default. Can a vendor disaffirm his contract, when he himself is in default? Can he enforce a strict compliance with the contract against the vendee whilst he himself disregards the terms of it? The rule, that he who asks equity must do equity, applies with equal force to both parties.

When a vendor, acting in good faith, sells land, to which he believes he holds a good title, and on which the vendee enters and makes valuable improvements; and it afterwards turns out that the title of the vendor is so defective that he cannot make a good title; the vendee, after a reasonable lapse of time, will be compelled to make his election either to receive the deed or surrender the possession of the premises. But in such case the vendor must show a willingness to make the deed or return the purchase money paid.

In this case the defendant brought his action of ejectment in eighteen hundred and twenty-two, without tendering the deed or offering to refund the purchase-money and pay for the improvements. He attempts to disaffirm the contract, on the default of the plaintiff, some sixteen or eighteen months, disregarding the dispute as to the title,

while he himself had been in default for nearly eight years. But he attempts to do more than this. He endeavors to take advantage of his own negligence, by placing the plaintiff in a worse condition than he would have stood if the deed and mortgage had been executed. This would be a new head of equity arising out of a party's own default.

It is admitted that negligence on the part of the defendant will not excuse gross negligence on the part of the complainant; but it goes to lessen any hardship complained of by the defendant, and it weakens or destroys his right to a specific execution of the contract. And if it shall appear that the failure of the defendant tended to produce the default of the complainant, it will go far to excuse him.

There are cases in which both parties have been so negligent as to prevent either from receiving a favorable consideration in a court of equity; and however a party may have disregarded his terms of the contract, the other party, to entitle himself to a specific execution of it, must show reasonable diligence; he must do, or offer to do, that which he is bound to perform, unless prevented by some justifiable excuse, or by the act of the other party.

Do the circumstances of this case, which are relied on by the complainant, excuse his default?

Chancery will not compel a party to receive a doubtful title; nor in a case where he has expended large sums of money in making improvements on the property, and paid a part of the consideration, will it compel him to make an election to take the title or relinquish the possession of the land, except after a reasonable lapse of time. Where there is no prospect that the vendor, by time, could perfect his title, the election might be directed in a short time; but where, with diligence, the title may be cleared in the course of some months, or even years, under peculiar circsmstances, equity will give relief by adapting its proceedings to the circumstances of the case.

Time is often given to the vendor to perfect his title when he has acted fairly, and until he can make a clear title, there is no case where a court of chancery has compelled the payment of the consideration money, unless the terms of the contract specially require it. In the case under consideration the defendant, strictly, had no right to demand a payment of either the second or third instalment until he had executed a deed for the property; and if he had brought a suit for the money, chancery might have interposed its powers, under special circumstances, by enjoining the proceedings until he had executed the conveyance, not as a matter of form, but such a conveyance as vested a clear title in the plaintiff.

If the complainant can be considered in the right of a mortgagor, under the circumstances of the case, his right would be undoubted; the lot would be considered merely a security for the debt, and equity would give the mortgagor his debt and interest, and nothing more. An express provision may be inserted in the mortgage, that if the money were not paid at a particular time the mortgagor shall be foreclosed; yet equity will permit him to redeem in the same manner as

if no such stipulation had been entered into. The mortgagee shall not take advantage of the necessities of the mortgagor and obtain the estate itself, when the payment of the money was the object to be secured. The maxim is, once a mortgage always a mortgage, and in this view it is considered by a court of equity. And why shall not the parties be treated as bearing this relation to each other. If this be not technically their position it is the fault of the defendant; and shall his own default give him an advantage in equity?

Chancery considers what ought to be done by the parties as done. And this rule, it would seem, can in no case apply with greater justice than to the case under consideration.

If, then, in equity we consider the plaintiff as mortgagor and the defendant as mortgagee, the lapse of time has not extinguished the plaintiff's equity of redemption. And if this view shall seem to impose some hardship on the defendant, it is chargeable to himself. The court look at the contract and determine his rights by the rule which which he has himself prescribed. They only say that his neglect to execute a deed has prevented the execution of the mortgage by the complainant; and that equity cannot consider him as placed in a better condition by this neglect, nor the plaintiff in a worse one.

But independent of this view, if the default of the defendant be connected with the shade that rested upon the title, which was first made known to the complainant about the time his default occurred, and we look at the proceedings at law by the defendant, through which he entered into the possession of the property and still retains possession of it, we think such an excuse arises for the failure of the plaintiff, as to authorize him to ask the favorable interposition of the court.

And this view is greatly strengthened by the fact, that the defendant endeavoured to put an end to the contract by bringing the ejectment, without making an offer to return the whole or any part of the money paid on the purchase or laid out in improvements. Nor has such an offer been since made. He seems to think that the nine thousand dollars expended on the property, and paid to him by the plaintiff, were either forfeited by his default, or reimbursed by the rents he received.

And here the question arises, whether the vendor can disaffirm the contract, where he has himself refused to perform it; at least, without returning or offering to return the money which has been paid and expended on the property; and also the outstanding obligation for the residue of the purchase money.

By the doubt in which the title of the lot was involved, and the change of possession, the complainant was compelled to rescind contracts which he had made for the sale of the greater part of it. At no time does he show a disposition to abandon his purchase, if the defendant can make him a good title.

But little more than eighteen months had transpired from the failure to pay the ten per cent. interest, under the new agreement, before the ejectment was commenced. And this delay, we think, was ex-

cusable from the doubts resting upon the title, and the other circumstances of the case. And we also think the doubts which still remained on the title, and the embarrassments which resulted to the plaintiff from the acts of the defendant, subsequently to the bringing of the ejectment, up to the time the tender was made, may go to excuse the default.

The accounts of payments were kept by the defendant, and he refused to exhibit a statement, though called on for the purpose. And it appears from the evidence, that this property was about as valuable when the tender was made, in 1827, as it was when the complainant failed to pay the ten per cent. interest.

From the supplemental bill, lately filed, it appears a part of the lot in controversy was sold by the complainant to Canby, and that he assigned his interest to Carneal. And this equity being still in Carneal, it is objected that he is not made a party to the suit.

Is Carneal interested in this controversy? It is admitted that he might file his bill against Taylor, and set up his equity through his assignors. And if he may do this, is he not interested in the subject matter of the bill? Is not the court called upon to act on an equitable title, which includes the title of Carneal? And if he be not a party to the suit, will his rights be concluded by the decree?

It is true he may look to the complainant for a deed, but is he not the assignee of the plaintiff to the extent of the equity he claims?

The Supreme Court has decided that an assignee in equity must make his assignors a party, when he asks a specific execution of the contract. And this is required to be done, that the court may see that the rights of the assignor are duly protected. But how much stronger is the reason to make the assignee of the equity a party, on a bill filed by the assignor. The interests of the assignee are directly involved, and how can these be protected unless he be made a party to the suit?

Carneal may have some special ground of equity against Taylor, which the plaintiff has not, and a decree in the case, as it now stands, would not prevent him from setting up this equity hereafter. And if the defendant may be again harassed with the assertion of a right, which is necessarily involved in this suit, he may well object to the further progress of the suit, until Carneal shall be made a party. He has a right to insist that the whole controversy shall be decided in the present suit.

It is a well settled principle that the assignee of an equity is a necessary party, when such equity is set up in a court of chancery.

Carneal can be made a party as co-plaintiff, so that no objection arises to this, from the limited jurisdiction of this court.

That some inconvenience may arise in making assignees parties where they are very numerous, may be admitted. But the same inconvenience arises in many other cases, and for which the law has, as yet, provided no remedy, except in cases where a few persons may sue in behalf of themselves and others.

The question raised as to the ten per cent. on the purchase money due, under the new agreement, up to the time of the tender, is reserved until the next term; at which time, Carneal having been made a party, the court will be prepared to make a final decree.

Opinion of the Court, July Term, 1839.

This case was continued from the last term, with leave to the plaintiffs to make Carneal, the assignee of a part of the equity set up in the complainant's bill, a party. The merits of the controversy were fully considered and decided at that term; except a question reserved, whether ten per cent. interest under the agreement should be decreed, on the balance due of the purchase money.

The bill having been amended by making Carneal & Co. complainant, the defendant's counsel object to proceeding in the cause, as no subpœna has been issued since the amendment, or notice served on the defendant. And that the defendant being a resident of the State of Kentucky, no process can be served on him so as to give jurisdiction to the court of the new matter inserted by the amendment.

The bill in this case was designed to be an injunction bill. An injunction was prayed for and allowed, and was not issued, because the writ of possession, which was intended to be enjoined, was executed before the injunction could be obtained. And it is well settled that where the object of a bill is to stay proceedings at law, between the same parties, a service of the notice on the attorney of the party is sufficient.

It is true, that where process is served, in an original suit, beyond the District, the party may take the exception, and he is not bound to answer; but this, it is said, is a personal privilege which he may waive. But in this case no subpœna was issued, and the question arises whether the complainant was bound to issue one. And this must be determined from the nature and extent of the amendment.

Carneal makes no new defendants, and asks no decree against the defendants in court. Being the assignee in part of the equity, asserted in the bill, his right is stated, that it may be protected by the court.

He does not pray for a decree of conveyance, but is content that the decree shall be for the complainant, subject to the right of the assignee. No new fact is asserted in the amendment, and no answer of the defendant is required; and, consequently, it is insisted no process was required to be issued or served on the defendant. If the service of process were essential to give effect to the amendment, and the defendant resides beyond the jurisdiction of the court, the court for this reason, as in numerous other cases, would sustain jurisdiction of the cause, without requiring the amendment. The excuse would be sufficient to dispense with Carneal as a party.

But was it necessary, by the rule of proceeding in the High Court of Chancery, in England, which constitutes the rule of practice in this case, to issue process?

In the case of Augersten *vs.* Clarke, 1 Ves. 250, the question was, whether, upon an amended bill, it is necessary to serve new subpœnas upon the original defendants.

The Lord Chancellor asked the register whether in the common case of an amended bill, upon exceptions, new subpœnas are served.

The register answered in the negative, and such was the decision, 4 Ves. 65. After answer the bill was amended. The defendant being abroad, a motion had been made on the part of the plaintiffs, as of course, that the service of the subpœna on the defendant's clerk should be deemed good service.

The register declined drawing up the order.

Mr. Thomas, for the motion, distinguished this from cases in which exceptions to the answer and bill being allowed, and the bill amended, the usual order is, that the amendments and exceptions shall be answered together. In that case a new subpœna is not necessary, a complete answer not being put in. In this instance the answer was sufficient. The Lord Chancellor said he understood from the register that there is no occasion for a subpœna upon an amended bill.

In Blake's Chan. Prac. 195, it is said, an amended bill is considered as an original bill, but new subpœnas are not necessary, unless where there is a new engrossment of the bill. 2 Mad. 287. In 1 Har. Chan. the rule is stated to be, that after answer the plaintiff may have leave to add parties, or amend his bill with respect to them, without costs; and so he may in other matters, if he requires no further answer of those that have already answered; and that the defendant be at liberty to answer, if he think fit. And in 1 Har. Chan. 93, it is said a plaintiff may be struck out of the bill any time before hearing, a special order of the court being had for that purpose.

It is clear from the above authorities, and from the reason of the case, that no process was necessary to bring the defendant into court, to answer the amended bill. He was in court, and subject to the orders of the court. And as, from the nature of the amendment, no answer was required from the defendant, it was, perhaps, unnecessary to enter a rule for answer. But such a rule was entered and no answer has been filed. The court think that as the amendment introduces no new fact, and does not, in any respect, affect the merits of the case, the plaintiff may proceed without answer; and that a subpœna was unnecessary.

And as it regards the question of interest reserved, the court think that the agreement to pay ten per cent. interest, being against law, cannot be enforced. But the court will not disturb the payments of this interest which have been voluntarily made. A court of equity cannot decree a specific execution of a contract made in violation of law, or against the policy of the law. The case in 8 Cranch, 477, relied on by the defendant's counsel, is where the party contracted to pay one hundred pounds damages for every lot not built upon, and

the court decreed this sum. Now, that was not where an illegal rate of interest was agreed to be paid on a certain contingency, but a fixed sum, as damages for a failure to build. If this sum had been named as a penalty, its payment would not have been enforced in equity. But it was stipulated damages, fixed by the parties, as the sum to be paid on a breach of the contract. A contract thus made is binding on the parties, as well in a court of equity as at law.

The court direct that the legal rate of interest shall be calculated on the balance of the purchase money; and that the annual rents, from the time the defendant entered into possession of the premises be deducted therefrom. That the sum which the annual rents shall, amount to, after discharging the purchase money and interest, shall be paid by the defendant to the complainant; and that the defendant shall convey to the complainant, by a deed of general warranty, the premises in question. The costs to be divided between the parties, on the ground that the complainant has, on various occasions, been permitted to amend his bill, &c.

589.

SUPREME COURT OF THE UNITED STATES.

No. 53.

WILLIAM REMINGTON, PLAINTIFF IN ERROR,

vs.

OTHO M. LINTHICUM.

IN ERROR TO THE CIRCUIT COURT U. S. FOR WASHINGTON.

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THE UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Judges of the Circuit Court of the United States for the District of Columbia, sitting for the county of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Richard Roe, on the demise of Otho M. Linthicum, plaintiff, and William Remington, defendant, a manifest error hath happened, to the great damage of the said William Remington, as by his complaint appears: we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be therein given, *that* under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of August next, in said Supreme Court, to be then and there held, and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, which of right, and according to the laws and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the said Supreme Court.

Issued this 30th day of April, 1839.

W. BRENT,
Clk. Ct. Dist. of Col'a for Co'ty of Washington.

Filed 30th April, 1839.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to Otho M. Linthicum, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, on the first Monday of August next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United *States* for the District of Columbia, in the county of Washington, wherein William Remington is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said William Remington, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable William Cranch, Chief Judge of the Circuit Court of the District of Columbia, this 30th day of April, 1839.

W. CRANCH.

Service acknowledged.

JNO. MARBURY,
For O. M. LINTHICUM.

Know all men by these presents, that we, William Remming, Thomas Cissell, and John Stone, are held and firmly bound unto O. M. Linthicum in the full and just sum of two thousand dollars, current money, to be paid to the said Otho M. Linthicum, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, and each of us, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this thirtieth day of April, 1839.

Whereas, lately, at a circuit court of the District of Columbia, sitting for the county of Washington, in a suit pending in the said court, wherein Richard Roe, on the demise of the said Otho M. Linthicum, was plaintiff, and the said William Remington was defendant, judgment was rendered against the said defendant; and he having obtained a writ of error, and filed a copy thereof in the clerk's office of said circuit court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said Otho M. Linthicum, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of August next:

Now, the condition of the above obligation is such, that if the said William Remington shall prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be null and void; otherwise, to be and remain in full force and virtue.

his
WILLIAM ⋈ REMINGTON, [SEAL.]
mark.
THOMAS CISSELL, [SEAL.]
JNO. STONE. [SEAL.]

Signed, sealed and delivered, in the presence of
JAMES GETTYS.

Approved, 30th April, 1839. J. S. MORSELL.

Copy—Test: W. BRENT, *Clk.*

Style of Court.

DISTRICT OF COLUMBIA, *sct.*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on

the fourth Monday of March, being the twenty-fifth day of the same month, in the year of our Lord one thousand eight hundred and thirty-nine, and of the independence of the United States the sixty-third,

Were present: The Hon. WILLIAM CRANCH, *Chief Judge*,
BUCKNER THRUSTON, } *Ass't*
JAMES S. MORSELL, } *Judges.*
ALEXANDER HUNTER, Esquire, *Marshal.*
WILLIAM BRENT, *Clerk.*

In the record of the proceedings of the said court, among others, are the following, to wit:

Parties.

OTHO M. LINTHICUM'S LESSEE,
vs.
WILLIAM REMINGTON, tenant in possession.

Be it remembered, that heretofore, to wit, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and thirty-eight, Richard Roe, lessee of the said Otho M. Linthicum, by John Marbury, Esquire, his attorney, declared, in the circuit court here, against John Doe, in a plea of trespass in ejectment, with a notice thereto annexed, in manner and form following, to wit:

Nar.

WASHINGTON COUNTY, *District of Columbia, to wit:*

John Doe, late of Washington county aforesaid, was attached to answer unto Richard Roe, in a plea, wherefore, with force and arms, &c., at the county aforesaid, he entered into that lot, piece or parcel of land lying and being in Georgetown, and county aforesaid, being all that part of lot numbered one hundred and fifty-three, in Beatty and Hawkin's addition to Georgetown, which is bounded as follows, to wit: beginning for the same at the end of a line drawn two hundred and six feet from Market street, thence running east with Third street fifty feet, thence south one hundred and fifty feet, then west fifty feet, then north to the beginning—with the appurtenances, which Otho M. Linthicum demised to the said Richard for a term of years which is not yet expired, and ejected him from his said lot, piece or parcel of land, and other wrongs to the said Richard then and there did, to the great damage of the said Richard, and against the peace, government and dignity of the United States.

And whereupon the said Richard, by John Marbury, his attorney, complains that the said Otho M. Linthicum, heretofore, to wit, on the first day of February, in the year eighteen hundred and thirty-eight, at the county aforesaid, had demised to the said Richard all that lot, piece or parcel of land lying and being in Georgetown aforesaid, be-

ing that part of lot number one hundred and fifty-three, in Beatty and Hawkin's addition to Georgetown aforesaid, which is bounded as follows, to wit: beginning for the same at the end of a line drawn two hundred and six feet from Market street, thence running east with Third street fifty feet, thence south one hundred and fifty feet, then west fifty feet, then north to the beginning—with the appurtenances, to have and to hold the same to the said Richard and his assigns, from the thirty-first day of January then last passed, for, during and until the full end and term of fifteen years from thence next ensuing, and fully to be complete and ended; by virtue of which said demise, the said Richard entered into the said lot, piece or parcel of land, with the appurtenances, and was possessed thereof; and being so possessed thereof, the said John, afterwards, to wit, on the day and year first aforesaid, with force and arms, that is to say, with sticks and staves, at the county aforesaid, entered into the said lot, piece or parcel of land, with the appurtenances, which the said Otho had demised to the said Richard, in manner aforesaid, for the term aforesaid, which is not yet expired, and ejected the said Richard from his said lot, piece or parcel of ground, and other wrongs to the said Richard then and there did, to the great damage of the said Richard, and against the peace, government and dignity of the United States, &c.

Wherefore, the said Richard says he is injured, and has sustained damage to the value of ten dollars; and therefore he brings suit, &c.

JNO. MARBURY, *Plff's Atty.*

Notice to Terre Ten't.

Sir: I am informed that you are in possession of, or claim title to, the premises in the declaration mentioned, or to some part thereof; and I, being sued in this action as a casual ejector only, and having no title or claim whatsoever to the said premises, do advise you to appear in the circuit court of the District of Columbia for Washington county, on the fourth Monday of March next, by some attorney of that court, and then and there, by rule of the said court, to cause yourself to be made defendant in my stead; otherwise, I shall suffer judgment to be entered against me, and you will be turned out of possession.

I have the honor to be, sir, your ob't serv't and old friend,

JOHN DOE.

To Mr. Wm. Remington,
Tenant in possession of the premises.

A copy of which said declaration and notice was made and sent to the marshal of the District of Columbia, thereon endorsed, "To be served on the defendant, the tenant in possession, or set up on the premises, at least days before the return thereof."

At which mentioned fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-eight, being the day of

the return of the service of the aforegoing declaration in ejectment, comes into the circuit court here the said Richard Roe, lessee of the said Otho M. Linthicum, by his attorney aforesaid; and the marshal to whom the said declaration in ejectment and notice as aforesaid was in form aforesaid made and sent, certifies his service thereof to the court here in form following, to wit:

Marshal's Return, and Appearance of Defendant.

"Service by setting up a copy of the declaration and notice thereto annexed, on the premises in the said declaration mentioned.

A. HUNTER, *Marshal.*"

Whereupon the said Richard Roe, lessee of the said Otho M. Linthicum, by his attorney aforesaid, prays that the defendant, the tenant in possession of the premises aforesaid, or those under whom he claims, may appear and answer to the declaration aforesaid.

Whereupon, William Remington, the tenant in possession, by Brent & Brent, Esquires, his attorneys, appear in court here; and it is ruled by the court here, with the consent of the said Richard Roe, lessee as aforesaid, by his attorney aforesaid, and the said William Remington, (who claims the title in question, by his attorney aforesaid,) that the said William Remington be admitted defendant in the place of John Doe, the casual ejector, and at the trial thereon to be had, the said William Remington shall appear, in proper person or by attorney, and confess lease, entry and actual ouster and expulsion of so much of the land in the declaration of the said Richard Roe, lessee as aforesaid, as is in the possession of the said William Remington, or his tenant, or of any other person claiming by or under his title; or in default thereof, that judgment be entered against the now defendant, John Doe, the casual ejector, but that prosecution be stayed against him until he makes default in any of the premises.

And it is further ruled by the court here, with the consent of the counsel, that if, by reason of such default, the said Richard Roe, lessee as aforesaid, shall become non-suit at the trial, the said William Remington shall take no advantage thereof, but shall pay to the said Richard Roe, lessee as aforesaid, his costs, &c.

And it is further ruled by the court here, that if, upon the trial of the said issue, a verdict shall be given for the said William Remington, or if the said Richard Roe, lessee as aforesaid, shall not prosecute his declaration upon other cause than for the not confessing lease, entry and ouster as aforesaid, then the said Otho M. Linthicum, lessor of the said Richard Roe, shall pay costs, &c.

Imparlance to November Term, 1838.

And thereupon the said William Remington, by his attorney aforesaid, defends the force and injury, when, &c., and prays leave of the court here to imparle until the fourth Monday of November next;

and he has it, and the same day is given to the said Otho M. Linthicum, in like manner, and so forth.

Defence on Title, Not Guilty, and Issue.

At which said fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-eight, to which said day the said William Remington had leave to imparle, &c., comes into the circuit court here, as well the said Richard Roe, lessee as aforesaid, by his attorney aforesaid, as the said William Remington, by his attorney aforesaid; and the said William, by his attorney aforesaid, as before, defends the force and injury, when, and so forth, and takes his defence of and upon the premises in question upon his title thereto, and says he is not guilty of the trespass and ejectment in the said declaration mentioned, in manner and form as the said Richard Roe, lessee as aforesaid, above complain*ing*. Of this he puts himself upon the country, &c.

Venire facias to March, 1839.

And the said Richard Roe, lessee as aforesaid, in like manner, and so forth; therefore let a jury thereupon appear before the court here, on the fourth Monday of March next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c.; and the same day is given to the said parties, then and there, &c.

And now, to wit, the said fourth Monday of March, in the year of our Lord, one thousand eight hundred and thirty-nine, comes into court here, as well the said Richard Roe, lessee as aforesaid, by his attorney aforesaid, as the said William Remington, by his attorney aforesaid.

Verdict—Guilty, &c.

Whereupon, for trying the issue aforesaid, it is ordered by the court here, that twelve persons from the panel of petit jurors, returnable to the court here by the marshal of the District aforesaid, be drawn by ballot, according to law, and twelve persons being so drawn and called, come, to wit:

1. Benjamin K. Morsell,
2. William N. Waters,
3. Electius Semmes,
4. Henry L. Cross,
5. Joseph Brooks,
6. Vincent King,
7. Thomas Parker,
8. John Mount,
9. Thomas Burch,
10. Benjamin E. Gittings,
11. Benj'n Beall,
12. Augustin Newton,

who, being empaneled and sworn to say the truth in the premises, upon their oath do say, that the said William Remington is guilty of the trespass ejectment aforesaid in manner and form as the

said Richard Roe, lessee, as aforesaid, hath complained, and they assess to him one cent damages.

Judgment on Verdict.

Therefore it is considered by the court here, that the said Richard Roe, lessee as aforesaid, recover against the said William Remington his term aforesaid, yet to come and unexpired, of, in and unto that lot, piece, or parcel of land in the declaration mentioned, and that the said Richard Roe, lessee as aforesaid, have thereof his possession against the said William Remington. And it is also considered by the court here, that the said Richard Roe, lessee as aforesaid, recover against the said William Remington as well the sum of one cent, the damages assessed by the jury aforesaid, as the sum of by the court here unto him, on his assent, adjudged for his costs and charges by him about his suit in this behalf laid out and expended; and the said William, in mercy, &c.

Memorandum.

Before the jurors aforesaid withdrew from the bar of the court here, the said William, by his attorney aforesaid, filed in court here the following bills of exceptions, to wit:

Defendant's first Bill of Exceptions.

JOHN DOE, ex dem. Linthicum,
vs.
WILLIAM REMINGTON.

At the trial of this cause, the plaintiff offered in evidence the record and proceedings in three cases of O. M. Linthicum against Z. M. Offutt, (copied in page ,) and then further offered in evidence three writs of fieri facias issued against the lands of said Offutt, (copied in page ,) which is admitted by the plaintiff had not been returned to the clerk's office by the marshal, but are here produced by the marshal, at the instance of the plaintiff, with the endorsement on them; and further offered in evidence the schedule of property levied on, which is, at the same time, produced with said writs by the marshal, (copied in page); and he also offered in evidence the private book of entries kept by the marshal of his official sales, &c., in which is the following entry, made on the 13th January, 1838, by his clerk employed in his office, but who was not a deputy marshal, (copied in page); and further offered to prove that said entry was truly copied from an original memorandum made by the deputy marshal at the time of sale, which original paper is lost, and that said entry was made in the said book, by said clerk, according to the usage and practice of said marshal's office.

And the plaintiff further offered to give in evidence a written

return of said writs of execution by said marshal, (copied in page) which return, it is admitted by the plaintiff, was not written or made out until after the jury were empaneled in this cause; and the plaintiff accompanied his said last mentioned offer with a prayer to the court to authorise said marshal to make said written return of said writs; to the admissibility of all which testimony so offered, and to the granting of which prayer, the defendant objected; but the court overruled said objection, and authorised the marshal to make said written return, and admitted the said written return, as well as the other testimony above offered by the plaintiff, to go in evidence to the jury; and the defendant excepts, and prays that this his bill of exceptions may be signed and sealed, which is done, and ordered to be enrolled this 19th day of April, 1839.

W. CRANCH, [SEAL.]
JAMES S. MORSELL, [SEAL.]

Defendant's second Bill of Exceptions.

LINTHICUM
vs.
REMINGTON.

The counsel for the plaintiff, in opening his case to the jury, claimed title to the premises in question under a sale by the marshal of said premises under a writ of fi. fa. at the suit of O. M. Linthicum *vs.* Z. M. Offutt, and that said defendant claimed title to same premises under a conveyance from said Offutt to W. Remington, which said last mentioned deed would be proved to be fraudulent and void as against said plaintiff. And the counsel for defendant having, in his opening of his cause to the jury, stated that the defendant did claim title under said deed from Offutt to Remington, and the said plaintiff having offered the evidence mentioned in the preceding bills of exceptions, now, for the purpose of showing that said defendant claimed title under Offutt, and preparatory to impeaching the same for fraud, gave in evidence the deed from Z. M. Offutt to James Remington, (copied in page ,) and the deed from James Remington to William Remington, (copied in page); and then offered further to prove that said last mentioned deeds were fraudulent and void as against said plaintiff, to the admissibility of which said evidence, the defendant objected; but the court overruled the objection, and the defendant excepts, and this his bill of exceptions is signed, sealed, and ordered to be enrolled this 19th April, 1839.

W. CRANCH, [SEAL.]
JAMES S. MORSELL. [SEAL.]

Defendant's third Bill of Exceptions.

LINTHICUM
vs.
REMINGTON.

The plaintiff, in addition to the evidence contained in the aforegoing bills of exceptions, offered evidence tending to prove that the conveyance from Z. M. Offutt to James Remington was fraudulent as against the plaintiff's lessor; and the defendant then offered evidence tending to prove that the said mentioned conveyance was fair and bona fide, and for a valuable consideration, and not intended to hinder, delay, or defraud the said plaintiff's lessor; and then moved the court to instruct the jury that, upon the evidence offered by the plaintiff, if believed by them, he is not entitled to recover; which instruction the court refused to give, and the defendant prays this his bill of exceptions to be signed, sealed and enrolled, which is done this 19th April, 1839.

W. CRANCH, [SEAL.]
JAMES S. MORSELL. [SEAL.]

Proceedings in the case of O. M. Linthicum *vs.* Z. M. Offutt, referred to in defendant's first exception, page .

OTHO M. LINTHICUM
vs.
ZACHARIAH M. OFFUTT.

Be it remembered, that heretofore, to wit, on the eighteenth day of October, in the year of our Lord, one thousand eight hundred and thirty-six, the said plaintiff prosecuted and sued forth, out of the circuit court here, the United States writ of capias ad respondendum, directed to the marshal of the District of Columbia, in the words and of the tenor following, to wit:

Capias ad respondendum.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America, to the Marshal of the District of Columbia—Greeting:

We command you that you take Zachariah M. Offutt, late of Washington county, if he shall be found within the county of Washington, in your said district, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held for the county of Washington, at the city of Washington, on the fourth Monday of November next, to answer unto Otho M.

Linthicum in a plea of trespass on the case, and so forth. Hereof fail not at your peril, and have you then and there this writ.

Witness the Hon. W. Cranch, chief judge of our said circuit, at the city of Washington, the 14th day of July, anno Domini one thousand eight hundred and thirty-six.

Issued this 1st day of October, 1836.

W. BRENT, *Clerk.*

MARBURY.

And the said plaintiff, by his attorney aforesaid, on the day of prosecuting and sueing forth of the aforesaid writ, declared against the said defendant in the plea aforesaid, in form following, to wit:

Nar.

DISTRICT OF COLUMBIA, *Washington County, to wit:*

Zachariah M. Offutt, late of Washington county, painter, was attached to answer unto Otho M. Linthicum in a plea of trespass on the case, and so forth. Whereupon the said plaintiff, by John Marbury, his attorney, complains that, whereas heretofore, to wit, at Washington county aforesaid, the said defendant made his certain promissory note in writing, bearing date the day and year aforesaid, and thereby then and there, sixty days after the date thereof, promised to pay Otho M. Linthicum, by the name of Otho M. Linthicum, or order, the sum of five hundred forty-six dollars and twenty-three cents, current money of the United States, for value received.

By reason whereof, and by force of the statute in such case made and provided, the defendant became liable to pay the said sum of money in the said note mentioned to the said plaintiff, according to the tenor and effect of the same; and being so liable in consideration thereof, then and there undertook and promised to the plaintiff to pay him the same, according to the tenor and effect thereof, when afterwards he should be thereunto requested.

And whereas the said defendant, afterwards, to wit, on the fifth day of June, in the year of our Lord eighteen hundred and thirty-four, to wit, at the county aforesaid, was indebted to the said plaintiff in another sum of five hundred forty-six dollars and twenty-three cents, like money; for the like sum of money by the said plaintiff, to, and for the use of, the said defendant, before that time paid, laid out and expended, at the special instance and request of the said defendant; and for other money by the said plaintiff, before that time, lent and advanced to the said defendant at his special instance and request; and for other money by the said defendant, before that time, had and received to the use of the said plaintiff; and being so indebted, the defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiff to pay him the said last men-

tioned sum of money, when afterwards he should be thereunto requested.

Yet the said defendant, the said several sums of money herein mentioned, or any part thereof, (although often thereto requested, to wit, on the day and year last aforesaid, and often afterwards, to wit, at the county aforesaid,) hath not paid to the said plaintiff; but the same, or any part thereof, to pay to the said plaintiff, hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff in the sum of one thousand dollars, current money; and therefore he brings suit, &c.

J. MARBURY,
Pl'ff's Att'y.

JOHN DOE,
RICHARD ROE, } Pledges, &c.

At which mentioned fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-six, and the day of the return of the aforegoing writ, comes into the circuit court here, the said plaintiff, by his attorney aforesaid; and the marshal of the district aforesaid, to whom the said aforegoing writ was, in form aforesaid, directed, makes return thereof to the court here, thus endorsed, to wit:

Marshal's Return.

"Cepi: ALEX'R HUNTER, *Marshal.*"

Defendant's Appearance.

And the said defendant being called, appears in court here in his own proper person; and thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here, that the said defendant give special bail in the plea aforesaid, or, in default thereof, be committed to the custody of the marshal of the District aforesaid; whereupon a certain William Remington, present here in court, in his proper person, with the consent of the said plaintiff, by his attorney aforesaid, undertakes for the said defendant, that in case the aforesaid plaintiff shall recover judgment against him, or that the said defendant shall be therein legally convict, then the said defendant shall pay the condemnation of the court thereof, or render his body to the custody of the marshal of the district aforesaid in satisfaction thereof, or that the said William Remington will do the same for him.

Rule—Plea—Imparlance.

And thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here, that the said defendant answer to the declaration aforesaid of the said plaintiff, in the plea aforesaid, or judgment by the court here will be entered against him

in default thereof; and the said defendant defends the force and injury when, and so forth, and prays leave of the court here to imparle until the fourth Monday of March next, and then to answer to the declaration aforesaid of the said plaintiff, in the plea aforesaid, and to him it is granted, and the same day is given to the aforesaid plaintiff, also.

March Term, 1837.

At which mentioned fourth Monday of March, in the year of our Lord, one thousand eight hundred and thirty-seven, to which said day the said defendant had leave to imparle, and then to answer to the declaration aforesaid of the said plaintiff, in the plea aforesaid, comes into the circuit court here the said plaintiff, by his attorney aforesaid; and thereupon the said plaintiff, by his attorney aforesaid, prays that the said defendant to his declaration aforesaid may answer; whereupon, it is ruled by the court here, on motion of the said plaintiff, that the said defendant answer to the declaration aforesaid of the said plaintiff; and the said defendant, although solemnly called, now here comes not, nor says any thing in bar or preclusion of the action aforesaid of him the said plaintiff, but therein doth make default, whereby the said plaintiff remains against the said defendant therein undefended.

Judgment by Default.

Therefore it is considered by the court here, that the aforesaid plaintiff recover against the said defendant as well the sum of one thousand dollars, current money, his damages aforesaid, sustained by occasion of the non-performance of the promise and assumption aforesaid, as also the sum of eleven dollars and twenty-seven cents, by the court here, unto the said plaintiff, on his assent, adjudged, for his costs and charges by him about his suit in this behalf laid out and expended; and the said defendant, in mercy, &c.

Memorandum.

Judgment rendered in this case, on the 13th day of July, 1837, for the damages laid in the declaration and costs of suit, the said damages to be released on payment of the sum of $546 23, with interest from the 3d day of June, 1834, until paid.

Test: W. BRENT, *Clerk.*

Proceedings in the second case of Otho M. Linthicum against Zachariah M. Offutt, to wit:

OTHO M. LINTHICUM
vs.
ZACHARIAH M. OFFUTT.

Be it remembered, that heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-

six, the said plaintiff, by John Marbury, Esq'r., his attorney, prosecuted and sued forth, out of the circuit court here, the United States writ of capias ad respondendum, directed to the marshal of the District of Columbia, in the words, and of the tenor following, to wit:

Capias ad Respondendum.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the Marshal of the District of Columbia—Greeting:

We command you that you take Zachariah M. Offutt, late of Washington county, if he shall be found within the county of Washington, in your said district, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the fourth Monday of November next, to answer unto Otho M. Linthicum in a plea of trespass on the case, and so forth.

Hereof fail not, at your peril, and have you then and there this writ.

Witness W. Cranch, Esquire, chief judge of our said court, at the city of Washington, the 14th day of July, anno Domini one thousand eight hundred and thirty-six.

Issued the 18th day of October, 1836.

W. BRENT, *Cl'k.*

MARBURY.

And the aforesaid plaintiff, by his attorney aforesaid, on the day of prosecuting and suing forth of the aforesaid writ, declared against the said defendant, in the plea aforesaid, in form following, to wit:

Nar.

DISTRICT OF COLUMBIA, *Washington County, ss.*

Zachariah M. Offutt, late of Washington county, painter, was attached to answer unto Otho M. Linthicum, in a plea of trespass on the case, and so forth.

Whereupon the said plaintiff, by J. Marbury, his attorney, complains that whereas heretofore, to wit, on the first day of April, in the year of our Lord one thousand eight hundred and thirty-four, to wit, at Washington county aforesaid, he, the said defendant, made his certain promissory note, in writing, bearing date the day and year aforesaid, and thereby then and there, ninety days after the date thereof, promised to pay to the said Otho M. Linthicum, by the name of Otho M. Linthicum, or order, the sum of six hundred and seven dollars and sixty-eight cents, current money of the United States, for value received.

By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said sum of money in the said note mentioned to the said plaintiff, according to the tenor and effect of the same; and being so liable in consideration thereof, then and there undertook and promised the said plaintiff to pay him the same, according to the tenor and effect thereof, whenever afterwards he should be thereto requested.

And whereas the said defendant, afterwards, to wit, on the fifth day of July, in the year of our Lord one thousand eight hundred and thirty-four, to wit, at the county aforesaid, was indebted unto the said plaintiff in another sum of six hundred and seven dollars, sixty-eight cents, like money, for the like sum of money by the said plaintiff to, and for the use of, the said defendant, before that time, paid, laid out and expended, at the special instance and request of the said defendant; and for other money by the said plaintiff, before that time, lent and advanced to the said defendant, at his special instance and request; and for other money by the said defendant, before that time, had and received to the use of the said plaintiff: and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiff to pay him the said last mentioned sum of money, when afterwards he should be thereunto requested.

Yet the said several sums of money herein mentioned, or any part thereof, (although often thereto requested, to wit, on the day and year last aforesaid, and often afterwards, to wit, at the county aforesaid,) hath not paid to the said plaintiff, but the same, or any part thereof, to pay to the said plaintiff, hath hitherto wholly refused, and still doth refuse, to the damage of the said plaintiff in the sum of twelve hundred dollars, current money; and therefore he brings suit, and so forth.

J. MARBURY, *Plff's Atty.*

JOHN DOE,
RICHARD ROE, } Pledges, &c.

At which mentioned fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-six, and the day of the return of the aforegoing writ, comes into the circuit court here, the said plaintiff, by his attorney aforesaid, and the marshal of the district aforesaid, to whom the said writ was in form aforesaid directed, makes return thereof to the court here, thus endorsed, to wit:

Marshal's Return.

"Cepi. ALEX. HUNTER, *Marshal.*"

Defendant's Appearance.

And the said defendant, being called, appears in court here, in his own proper person; and thereupon, on motion of the said plaintiff,

by his attorney aforesaid, it is ruled by the court here, that the said defendant give special bail in the plea aforesaid, or, in default thereof, be committed to the custody of the marshal of the district aforesaid. Whereupon a certain William Remington, present here in court in his proper person, with the consent of the said plaintiff, by his attorney aforesaid, undertakes for the said defendant, that in case the aforesaid plaintiff shall recover judgment against him, or that the said defendant shall be therein legally convict, then the said defendant shall pay the condemnation of the court thereupon, or render his body to the custody of the marshal of the district aforesaid, in satisfaction thereof; or that he, the said William Remington, will do the same for him.

Rule—Plea, and Imparlance.

And thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here, that the said defendant answer to the declaration aforesaid of the said defendant in the plea aforesaid, or judgment by the court here will be entered against him in default thereof. And the said defendant defends the force and injury, when, and so forth, and prays leave of the court here to imparle until the fourth Monday of March next, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid: and to him it is granted, and the same day is given to the aforesaid plaintiff also.

March Term, 1837.

At which mentioned fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-seven, to which said day the said defendant had leave to imparle, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, comes into the circuit court here the said plaintiff, by his attorney aforesaid; and thereupon the said plaintiff, by his attorney aforesaid, prays the said defendant to his declaration aforesaid may answer. Whereupon it is ruled by the court here, on motion of the said plaintiff, that the said defendant answer to the declaration aforesaid of the said plaintiff: and the said defendant, although solemnly called, now here comes not, nor says any thing in bar or preclusion of the action aforesaid of him, the said plaintiff, but therein doth make default, whereby the said plaintiff remains against the said defendant therein undefended.

Judgment by Default.

Therefore it is considered by the court here, that the aforesaid plaintiff recovers against the said defendant, as well the sum of twelve hundred dollars, current money, his damages aforesaid, sustained by occasion of the non-performance of the promise and as-

sumption aforesaid, as also the sum of eleven dollars and twenty-seven cents, by the court here unto the said plaintiff, on his assent, adjudged, for his costs and charges by him about his suit in this behalf laid out and expended; and the said defendant, in mercy, &c.

Mem.

Memorandum.—Judgment rendered in this case on this 13th day of July, 1837, for the damages laid in the declaration and costs of suit, the said damage to be released on the payment of the sum of $607 68, with interest from the 3d day of July, 1834, until paid.

Test: W. BRENT, *Clk.*

Proceedings in the third case of Otho M. Linthicum against Zachariah M. Offutt, referred to in defendant's exceptions, page .

OTHO M. LINTHICUM
vs.
ZACHARIAH M. OFFUTT.

Be it remembered, that heretofore, to wit, on the first day of October, in the year of our Lord one thousand eight hundred and thirty-six, the said plaintiff, by John Marbury, Esquire, his attorney, prosecuted and sued forth, out of the circuit court here, the United States writ of capias ad respondendum, directed to the marshal of the District of Columbia, in the words and of the tenor following, to wit:

Capias ad Respondendum.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the Marshal of the District of Columbia, greeting:

We command you that you take Zachariah M. Offutt, late of Washington county, if he shall be found within the county of Washington, in your said district, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held for the county aforesaid, at the city of Washington, on the fourth Monday of November next, to answer unto Otho M. Linthicum, in a plea of trespass on the case, and so forth.

Hereof fail not, at your peril, and have you then and there this writ.

Witness W. Cranch, Esquire, chief judge of our said court, at the city of Washington, this 14th day of July, anno Domini eighteen hundred and thirty-six.

Issued the 1st day of October, 1836.

W. BRENT, *Clk.*

MARBURY.

And the aforesaid plaintiff, by his attorney aforesaid, on the day of prosecuting and sueing forth of the aforesaid writ, declared against the said defendant in the plea aforesaid, in form following, to wit:

Nar.

DISTRICT OF COLUMBIA, *County of Washington, ss.*

Zachariah M. Offutt, late of Washington county, was attached to answer unto Otho M. Linthicum, in a plea of trespass on the case, and so forth.

Whereupon the said plaintiff, by J. Marbury, his attorney, complains, that whereas heretofore, to wit, on the first day of April, in the year of our Lord eighteen hundred and thirty-four, to wit, at Washington county aforesaid, the said defendant made his certain promissory note, in writing, bearing date the day and year aforesaid, and thereby then and there, thirty days after the date thereof, promised to pay to the said Otho M. Linthicum, by the name of Otho M. Linthicum or order, the sum of three hundred twenty-four dollars and fifty cents, current money of the United States, for value received.

By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said sum of money in the said note mentioned to the said plaintiff, according to the tenor and effect of the same, and, being so liable in consideration thereof, then and there undertook and promised the said plaintiff to pay him the same, according to the tenor and effect thereof, whenever afterwards he should be thereto requested.

And whereas the said defendant afterwards, to wit, on the fifth day of May, in the year of our Lord one thousand eight hundred and thirty-four, to wit, at the county aforesaid, was indebted unto the said plaintiff in another sum of three hundred and twenty-four dollars and fifty cents, like money, for the like sum of money by the said plaintiff to, and for the use of, the said defendant, before that time, paid, laid out and expended, at the special instance and request of the said defendant; and for other money by the said plaintiff, before that time, lent and advanced to the said defendant, at his *at his* special instance and request; and for other money by the said defendant, before that time, had and received to the use of the said plaintiff; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiff to pay him the said last mentioned sum of money, when afterwards he should be thereunto requested.

Yet the said defendant, the said several sums of money herein mentioned, or any part thereof, (although often thereto requested, to wit, on the day and year last aforesaid, and often afterwards, to wit, at the county aforesaid,) hath not paid to the said plaintiff, but the same, or any part thereof, to pay to the said plaintiff, hath hitherto

wholly refused, and still doth refuse, to the damage of the said plaintiff in the sum of six hundred dollars, current money: and therefore he brings suit, and so forth.

J. MARBURY, *Plff's Atty.*

JOHN DOE, RICHARD ROE, } Pledges, &c.

At which mentioned fourth Monday of November, in the year of our Lord one thousand eight hundred and thirty-six, and the day of the return of the aforegoing writ, comes into the circuit court here the said plaintiff, by his attorney aforesaid; and the marshal of the district aforesaid, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here, thus endorsed, to wit:

Marshal's Return.

"Cepi. A. HUNTER, *Marshal.*"

Defendant's Appearance.

And the said defendant, being called, appears in court here, in his own proper person. And whereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here, that the said defendant give special bail in the plea aforesaid, or, in default thereof, be committed to the custody of the marshal of the district aforesaid.

Whereupon a certain William Remington, present here in court in his proper person, with the consent of the said plaintiff, by his attorney aforesaid, undertakes for the said defendant, that in case the aforesaid plaintiff shall recover judgment against him, or that the said defendant shall be therein legally convict, then the said defendant shall pay the condemnation of the court thereupon, or render his body to the custody of the marshal of the district aforesaid, in satisfaction thereof, or that he, the said William Remington, will do the same for him.

Rule—Plea, and Imparlance.

And thereupon, on motion of the said plaintiff, by his attorney aforesaid, it is ruled by the court here, that the said defendant answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, or judgment by the court here will be entered against him in default thereof. And the said defendant defends the force and injury, when, and so forth, and prays leave of the court here to imparle until the fourth Monday of March next, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid; and to him it is granted; and the same day is given to the aforesaid plaintiff also.

March Term, 1837.

At which mentioned fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-seven, to which said day the said defendant had leave to imparle, and then to answer to the declaration aforesaid of the said plaintiff in the plea aforesaid, comes into the circuit court here the said plaintiff, by his attorney aforesaid. And thereupon the said plaintiff, by his attorney aforesaid, prays that the said defendant to his declaration aforesaid may answer. Whereupon it is ruled by the court here, on motion of the said plaintiff, that the said defendant answer to the declaration aforesaid of the said plaintiff: and the said defendant, although solemnly called, now here comes not, nor says any thing in bar or preclusion of the action aforesaid of him, the said plaintiff, but therein doth make default; whereby the said plaintiff remains against the said defendant therein undefended.

Judgment by Default.

Therefore it is considered by the court here that the aforesaid plaintiff recovers against the said defendant as well the sum of six hundred dollars, current money, his damages aforesaid, sustained by occasion of the non-performance of the promise and assumption aforesaid, as also the sum of eleven dollars and twenty-seven cents, by the court here unto the said plaintiff, on his assent, adjudged, for his costs and charges by him about his suit in this behalf laid out and expended; and the said defendant, in mercy, &c.

Memorandum.—Judgment rendered in this case on this 13th day of July, 1837, for the damages laid in the declaration and costs of suit, the said damages to be released on the payment of the sum of $324 50, with interest from the 4th day of May, 1834, until paid.

Test: W. BRENT, *Cl'k.*

Fi. fa., No. 65, to November Term, 1837, referred to in defendant's exceptions, page .

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the Marshal of the District of Columbia—Greeting:

Whereas, at a circuit court of the District of Columbia, held for the county of Washington, at the city of Washington, on the fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-seven, a certain Otho M. Linthicum, by judgment of the said court, recovered against a certain Zachariah M. Offutt as well the sum of thousand dollars, certain damages, occasioned by

the non-performance of a certain promise and assumption by the said Zachariah M. Offutt to the said Otho M. Linthicum, before that time paid, as the sum of eleven dollars twenty-seven cents, which was adjudged by the said court to the said Otho M. Linthicum, on his assent, for his costs and charges by him, about his suit in that behalf, laid out and expended; whereof the said Zachariah M. Offutt is convict, as it appeareth of record.

Therefore, you are hereby commanded, that of goods, chattels, lands and tenements of the said Zachariah M. Offutt being found in your said bailiwick, you cause to be made the damages, costs and charges aforesaid, and have the same before the circuit court of the District of Columbia, to be held for the county of Washington, at the city of Washington, on the fourth Monday of November next, to render unto the said Otho M. Linthicum the damages, costs, and charges aforesaid.

Hereof fail not, at your peril, and have you then and there this writ.

Witness William Cranch, Esquire, chief justice of the said court, the 15th day of August, in the year 1837.

Issued the 1st day of September, 1837.

W. BRENT, *Clerk.*

MARBURY.

On the back of the above was the following endorsement, to wit:

Damages, $1,000 and costs; costs, $11 27; additional cost, 91c. Damages to be released on payment of $546 23, with interest from 3d June, 1834, till paid.

And the marshal's return on the same is in the words following, to wit:

Levied as per schedule; property sold as per return annexed, and satisfied pl'ff as per receipt on writ.

ALEXANDER HUNTER, *Marshal.*

Received of Alexander Hunter, marshal, six hundred and seventy dollars and sixty-six cents, in full of this fi. fa. Debt, interest and costs, $670 66.

O. M. LINTHICUM.

January 22d, 1838.

Fi. fa., No. 66, referred to in defendant's exception, page , and returnable at November Term, 1837.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the Marshal of the District of Columbia—Greeting:

Whereas, at a circuit court of the District of Columbia, held for the county of Washington, at the city of Washington, on the fourth

Monday of March, in the year of our Lord one thousand eight hundred and thirty-four, a certain Otho M. Linthicum, by judgment of the said court, recovered against a certain Zachariah M. Offutt, as well the sum of twelve hundred dollars, certain damages, occasioned by the non-performance of a certain promise and assumption by the said Zachariah M. Offutt to the said Otho M. Linthicum, before that time made, as the sum of eleven dollars twenty-seven cents, which was adjudged by the said court to the said Otho M. Linthicum, on his assent, for his costs and charges by him, about his suit in that behalf, laid out and expended; whereof the said Zachariah M. Offutt is convict, as it appeareth of record.

Therefore, you are hereby commanded that of the goods, chattels, lands and tenements of the said Zachariah M. Offutt, being found in your said bailiwick, you cause to be made the damages, costs and charges aforesaid, and have the same before the circuit court of the District of Columbia, to be held for the county of Washington, at the city of Washington, on the fourth Monday of November next, to render unto the said Otho M. Linthicum the damages, costs and charges aforesaid.

Hereof fail not, at your peril, and have you then and there this writ.

Witness William Cranch, Esquire, chief justice of the said court, the 15th day of August, in the year 1837.

Issued the 1st day of September, 1837.

W. BRENT, *Clerk.*

MARBURY.

On the back of the above was the following endorsement, to wit:

Damages, $1,200 and costs; costs, $11 27; additional cost, 91c. Damages to be released on the payment of $607 68, with interest from 3d July, 1834, till paid.

And the marshal's return on the same is in the words following, to wit:

Levied as per schedule in No. 65; property sold as per return, and satisfied plaintiff the sum of five hundred and five dollars and 72 cents, as per receipt on writ; nulla bona the balance.

ALEXANDER HUNTER, *Marshal.*

WASHINGTON, January 22d, 1838.

Received of Alexander Hunter, marshal, four hundred and thirty-five dollars and ninety-four cents, on account of this fi. fa.

$435 $\frac{94}{100}$. O. M. LINTHICUM.

WASHINGTON, 26th May, 1838.

Received of Alexander Hunter, marshal, sixty-nine dollars and seventy-eight cents, the amount retained in his hands, at the suit of Cunningham, use of Remington, paid me by order of court. The case being submitted.

$69 $\frac{78}{100}$. O. M. LINTHICUM.

Fi. fa., No. 67, returnable to November Term, 1837, referred to in defendant's exceptions, page .

DISTRICT OF COLUMBIA, *to wit:*

The United States of America to the Marshal of the District of Columbia—Greeting:

Whereas, at a circuit court of the District of Columbia, held for the county of Washington, at the city of Washington, on the fourth Monday of March, in the year of our Lord one thousand eight hundred and thirty-seven, a certain Otho M. Linthicum, by judgment of the said court, recovered against a certain Zachariah M. Offutt, as well the sum of six hundred dollars, certain damages, occasioned by the non-performance of a certain promise and assumption by the said Zachariah M. Offutt to the said Otho M. Linthicum, before that time made, as the sum of eleven dollars twenty-seven cents, which was adjudged by the said court to the said Otho M. Linthicum, on his assent, for his costs and charges by him, about his suit in that behalf, laid out and expended; whereof the said Zachariah M. Offutt is convict, as it appeareth of record.

Therefore, you are hereby commanded that of the goods, chattels, lands and tenements of the said Zachariah M. Offutt, being found in your said bailiwick, you cause to be made the damages, costs and charges aforesaid, and have the same before the circuit court of the District of Columbia, to be held for the county of Washington, at the city of Washington, on the fourth Monday of November next, to render unto the said Otho M. Linthicum the damages, costs and charges aforesaid.

Hereof fail not, at your peril, and have you then and there this writ.

Witness William Cranch, Esquire, chief justice of the said court, the 15th day of August, in the year 1837.

Issued the 1st day of September, 1837.

W. BRENT, *Clerk.*

MARBURY.

On the back of the above was the following endorsement, to wit:

Damages, $600 and costs; costs, $11 27; additional cost, 91c. Damages to be released on payment of $324 50, with interest from 4th May, 1834, till paid.

And the marshal's return on the same is in the words following, to wit:

Levied as per schedule in No. 65; property sold and proceeds exhausted by judg'ts No. 65 and 66, to November term, 1837.

A. HUNTER, *Marshal.*

Schedule of the property levied on, referred to in defendant's exceptions, page .

One carpet, 22½ yards, *a* 75c.; one rug, one hair sofa and two old pillows, one eight-day clock, one looking-glass, 3 white curtains and piers, 1 pair card tables, 2 mahogany dining tables, 8 cane-bottomed chairs, 3 pictures and framing, 1 miniature frame, 2 plated candlesticks, snuffers and trays, 2 mantel ornaments, 2 stools, 1 hearth-brush and shovel, 1 mahogany case and bottles, 1 mahogany work-stand and desk, 1 bookcase and drawers, 1 mahogany sideboard, 1 large dinner table, 2 waiters, 1 carpet, 15¾ yds.; 1 rug, 8 chairs, 1 looking-glass, 2 brass candlesticks and 2 waiters, 1 pair andirons, shovel and tongs, 1 brush, 1 map of George Town, 6 decanters, 2 glass dishes, 10 tumblers, 13 wines, 1 glass pitcher, 1 large pitcher, 1 demijohn, 2 jugs and 2 jars, 2 dishes, lot of knives and forks, lot of crockery and China ware, 2 britannia tea and coffee pots, lot of plates and dishes, 1 sofa, 1 table and wash-stand, andirons and fender, 1 old carpet, 1 set of old castors, lot of kitchen ware, 1 old cart and 1 old sleigh, 1 wheelbarrow and 2 old saddles, 1 set of gear, 1 cutting-box, 2 tables, 1 wash-stand and 1 desk, 1 bureau, 1 mahogany stand and dressing-glass, 1 carpet, 1 old passage carpet and rods, 1 bay horse and cart, 1 grey horse and cart, 1 print James Madison, 1 do. Grand Lodge, U. S., 1 do. Charles Carroll, of Car'n, speech of Emmet, Sprigs of Laurel, Napoleon & Co., Lafayette and Washington, 1 bureau, 1 washstand and glass, 1 table.—(See schedule of real property, page 46½.)

ALEXANDER HUNTER, *Marshal.*

Account of Sales.

The property of Zachariah M. Offutt sold to satisfy judicials to November term, 1837, Nos. 65, 66 and 67, in favor of Otho M. Linthicum; also, judicials No. 355, to November term, 1837, in favor of Samuel Cunningham, use of William Remington, and struck off, as follows, referred to in exceptions, page .

January 13th, 1838.—Part of lot No. 153, in Beatty & Hawkins' addition to George Town, 30 feet front, with the improvements, sold to Otho M. Linthicum for -		$700 00
Part of lot No. 153, 20 feet front, sold to Otho M. Linthicum for - - - - - -		200 00
		$900 00
Deduct expenses, as follows:		
Printer's bill, (Advocate) - - -	$7 00	
Marshal's fee - - - - -	17 41	
		24 41
		$875 59

Amount brought over - - - -		$875 59
Sale of personal property sold 23d Dec. 1837.		
Nett am't after deducting $84 for house rent -		300 79
		$1,176 38
Am't of ex'n and credited jud's No. 65, to November term, 1837 - - -	$670 66	
Jud's No. 66, do. do. credited with this sum -	505 72	
		$1,176 38

ALEXANDER HUNTER,
Marshal, D. C.

Written return of the Marshal to the executions referred to in defendant's exceptions, page .

OTHO M. LINTHICUM *vs.* ZACHARIAH M. OFFUTT. } No. 66 Judicials, November Term, 1837.

By virtue of the said writ of fieri facias, to me directed, I hereby return to the said court that, in pursuance of said writ, returnable to November term, 1837, and under the levy by me made, as per schedule returned with the said writ, I did, after due advertisement thereof, sell the real property mentioned in said schedule and appraisement.

That said sale was made, according to law, on the 13th January, 1838; and at said sale, Otho M. Linthicum, being the highest bidder, became the purchaser of the first of said described pieces of property, viz: the part of lot No. 153, in Beatty & Hawkins' addition to George Town, described in said levy and schedule, for the sum of seven hundred dollars, and the other piece of property mentioned in said schedule and levy, viz: that part of lot No. 153, in Beatty & Hawkins' addition to George Town, therein described, for the sum of two hundred dollars; and having, in all respects, fulfilled and complied with the conditions of sale, and paid the purchase money to me, he became the purchaser thereof. All which I certify, and return, this 19th day of April, in the year 1839.

A. HUNTER, *Marshal.*

Schedule of Real Estate.

Part of lot No. 153, on Third street, in Beatty & Hawkin's addition to George Town, beginning two hundred and twenty-six feet from Market street, thence running east with Third street thirty feet, thence south one hundred and fifty feet, thence west thirty feet, and thence to the beginning one hundred and fifty feet, with the improvements thereon, being a two story brick house, &c. - - - - $1,000 00

Amount brought over - - - - -	$1,000 00
Also, part of lot numbered one hundred and fifty-three, in Beatty & Hawkins' addition to George Town, beginning on Third street, at a point two hundred and twenty-six feet east from Market street, and running thence west twenty-feet, thence south one hundred and fifty feet, thence east twenty feet, thence north one hundred and fifty feet, to the beginning; together with all and singular, the buildings, improvements, advantages, rights, privileges and appurtenances thereon, or in any manner belonging to, the said two pieces of ground aforesaid described, - - - -	200 00
	$1,200 00

Valued and appraised by the subscribers. Witness our hands and seals, this 11th day of November, 1837.

ROBERT BOYD, [SEAL.]
ROBERT BALL, [SEAL.]
JOHN BALL. [SEAL.]

Deed—Offutt to Remington.

Deed from Z. M. Offutt to James Remington, referred to in Defendant's 2d Exception, page .

ZACHARIAH M. OFFUTT *to* JAMES REMINGTON. } Deed recorded 17th October, 1835.

This indenture, made this eighteenth day of April, in the year of our Lord one thousand eight hundred and thirty-five, between Zachariah M. Offutt of the one part, and James Remington of the other part, both of the county of Washington, in the District of Columbia, witnesseth, that the said Zachariah M. Offutt, for and in consideration of the sum of twelve hundred dollars, to him in hand paid by the said James Remington, the receipt whereof is hereby acknowledged, hath given, granted, bargained and sold, and by these presents doth give, grant, bargain and sell, unto him, the said James Remington, the following described pieces of ground, lying and being in Georgetown, in the District of Columbia, viz: part of lot numbered one hundred and fifty-three, on Third street, in Beatty and Hawkins' addition to Georgetown, beginning two hundred and twenty-six feet from Market street, thence running east with Third street thirty feet, thence south one hundred and fifty feet, thence west thirty feet, and thence to the beginning one hundred and fifty feet; and also part of lot numbered one hundred and fifty-three, in Beatty and Hawkins' addition to Georgetown, beginning on Third street, at a point two hundred and twenty-six feet east from Market

street, and running thence west twenty feet, thence south one hundred and fifty feet, thence east twenty feet, thence north one hundred and fifty feet to the beginning; together with all and singular the buildings, improvements, advantages, rights, privileges and appurtenances thereon, or in any manner appertaining to the said two pieces of ground as aforesaid described: to have and to hold the said two pieces or parcels of ground so as aforesaid described, together with all and singular the buildings, improvements and advantages, rights, privileges and appurtenances thereon, or in any manner belonging thereto, unto him, the said James Remington, his heirs and assigns, and for no other use, intent or purpose whatsoever. And the said Zachariah M. Offutt, for himself, his heirs and assigns, doth hereby warrant and defend unto the said James Remington, his heirs and assigns, the said two pieces or parcels of ground, from all persons whatsoever claiming or to claim the same, or any part thereof.

In testimony whereof, the said Zachariah M. Offutt hath hereunto set his hand and affixed his seal, on the day and year first hereinbefore written.

Z. M. OFFUTT, [SEAL.]

Signed, sealed and delivered in the presence of
JAMES GETTYS,
JOEL BROWN.

DISTRICT OF COLUMBIA, *County of Washington, to wit:*

On this eighteenth day of April, in the year of our Lord eighteen hundred and thirty-five, personally appeared Zachariah M. Offutt, of the said county, being the party grantor above named, before us, two justices of the peace in and for the county aforesaid, subscribers hereto, and acknowledges the within deed or instrument of writing to be his act and deed, and the lands and premises therein mentioned and thereby bargained and sold to be the right and estate of the within named James Remington, party grantee also therein named, his heirs and assigns, forever, according to the purport, true intent and meaning of the said deed or instrument of writing. And now, at the same time, also appears Eliza Ann, wife of the said Zachariah M. Offutt, before us, two justices of the peace as aforesaid, and acknowledges the said deed or instrument of writing to be her act and deed, and the lands and premises therein mentioned to be the right and estate of the within named James Remington, his heirs and assigns, forever; and the said Eliza Ann, being by us privately examined, apart from and out of the hearing of her husband, "whether she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by, her husband, or fear of his displeasure," acknowledges that she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by, her husband, or fear of his displeasure. Taken and certified the day and year above written.

JAMES GETTYS,
JOEL BROWN.

Deed from James Remington to William Remington, referred to in Defendant's 3d Exceptions, page .

JAMES REMINGTON *to* WILLIAM REMINGTON. } Deed recorded April 16th, 1836.

This indenture, made this sixteenth day of October, in the year of our Lord eighteen hundred and thirty-five, between James Remington of the one part, and William Remington of the other part, both of the county of Washington, in the District of Columbia, witnesseth, that the said James Remington, for and in consideration of the sum of twelve hundred dollars, current money of the United States, to him in hand paid by the said William Remington, the receipt whereof is hereby acknowledged, hath given, granted, bargained and sold, and by these presents *do* give, grant, bargain and sell unto him, the said William Remington, the following described pieces of ground, lying and being in Georgetown in the District of Columbia, to wit: part of lot numbered one hundred and fifty-three, on Third street, in Beatty and Hawkins' addition to Georgetown, beginning two hundred and twenty-six feet from Market street, thence running east with Third street thirty feet, thence south one hundred and fifty feet, then west thirty feet, and thence to the beginning one hundred and fifty feet; and also part of lot numbered one hundred and fifty-three, in Beatty and Hawkins' addition to Georgetown, beginning on Third st. at a point two hundred and twenty-six feet east from Market st., and running thence west twenty feet, thence south one hundred and fifty feet, thence east twenty feet, thence north one hundred and fifty feet to the beginning; together with all and singular the buildings, improvements, advantages, rights, privileges and appurtenances thereon, or in any manner belonging to the said two pieces of ground as aforesaid described: to have and to hold the said two pieces or parcels of ground so as aforesaid described, together with all and singular the buildings, improvements, rights, privileges and appurtenances thereon, or in any manner belonging thereto, to him, the said William Remington, his heirs and assigns, and for no other use, intent or purpose whatsoever. And the said James Remington, for himself, his heirs, executors, and administrators, and assigns, doth hereby warrant and defend unto the said William Remington, his heirs and assigns, the said two pieces or parcels of ground, from all persons whatsoever claiming or to claim the same, or any part thereof.

In testimony whereof, the said James Remington hath hereunto set his hand and seal on the day and year first herein before mentioned.

JAMES REMINGTON. [SEAL.]

Signed, sealed, and delivered, in the presence of us:

ROBT. CLARKE,
JNO. D. CLARKE.

DISTRICT OF COLUMBIA, *County of Washington, sct:*

On this seventeenth day of October, in the year of our Lord one thousand eight hundred and thirty-five, personally appears James Remington, of the said county, being the party grantor within named, before us, two justices of the peace in and for the county aforesaid, subscribers hereto, and acknowledged the within deed, or instrument of writing, to be his act and deed, and the lands and premises therein mentioned, and thereby bargained and sold, to be the right and estate of the within named William Remington, party grantee, also therein named, his heirs and assigns forever, according to the purport, true intent and meaning of the said deed or instrument of writing; and now, at the same time, also, appears Mary M. Remington, wife of the said James Remington, before us, two justices of the peace aforesaid, and acknowledges the said deed, or instrument of writing, to be her act and deed, and the lands and premises therein mentioned to be the right and estate of the within named William Remington, his heirs and assigns forever; and the said Mary M. being, by us, privately examined, apart, from and out of the hearing of her husband, "whether she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by, her husband, or fear of his displeasure," acknowledges that she doth make her acknowledgment of the same willingly and freely, and without being induced thereto by fear or threats of, or ill usage by, her husband, or fear of his displeasure.

Taken and certified the day and year above written.

ROBERT CLARKE, *J. Peace.*
JNO. D. CLARKE, *J. Peace.*

And whereas, afterwards, to wit, on the day of in the year of our Lord one thousand eight hundred and thirty-nine, the said defendant, by his attorney aforesaid, produced and filed in court here the United States writ for the correcting of errors, of and upon the judgment aforesaid, directed to the judges of the circuit court of the District of Columbia, in the county of Washington; and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is hereby transmitted to the said supreme court accordingly.

In testimony whereof, I have hereunto subscribed my name and [SEAL.] affixed the seal of the said court, at the city of Washington, this 23d day of September, 1839.

W. BRENT, *Clerk.*

604.

SUPREME COURT OF THE UNITED STATES.

No. 54.

THE PHILADELPHIA AND TRENTON RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

JAMES STIMPSON.

IN ERROR TO THE CIRCUIT COURT U. S. FOR EASTERN DISTRICT OF PENNSYLVANIA.

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Langtree & O'Sullivan, Print.

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UNITED STATES, *sct:*

The President of United States to the Judges of the Circuit Court of the United States, holden in and for Eastern District of Pennsylvania, in the Third Circuit, greeting:

Because that, in the record and process, and also in the rendering of judgment in a certain suit before you, or some of you, between James Stimpson, plaintiff, and the Philadelphia and Trenton Railroad Company, defendants, in a plea of trespass on the case, &c., a manifest error has intervened, to the great damage of the said the Philadelphia and Trenton Railroad Company, as, in their complaint, has been stated; and, as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the second Monday of January next, at the city of Washington, being the seat of National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon, what, of right, ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States at Washington aforesaid, this eighth day of May, in the year of our Lord one thousand eight hundred and thirty-nine, and of the independence of the United States the sixty-third.

[L. S.]

FRA. HOPKINSON,
Clerk Circuit Court.

Allowed by JOS. HOPKINSON.

Pleas before the honorable the Judges of the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit at Philadelphia, of April Sessions, A. D. one thousand eight hundred and thirty-eight.

It is thus contained:

The Philadelphia and Trenton Railroad Company, late of the Eastern District of Pennsylvania, were summoned to answer James Stimpson of a plea of trespass on the case, &c. Whereupon, the said plaintiff, by J. R. Ingersoll, his attorney, complains for that the plaintiff, before and at the time of making the letters patent, and of committing the grievances hereinafter mentioned, was the true and original inventor of a certain new and useful improvement in the mode of

turning short curves on railroads, in the letters patent hereinafter mentioned fully described, which was not known or used before the time of his application for a patent as hereinafter mentioned; and the plaintiff being so as aforesaid, the inventor thereof, and being also a citizen of the United States on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and thirty-five, upon due application therefor by the plaintiff, the Secretary of State of the United States caused letters patent to be issued in the name of the United States, bearing date at Washington, the day last aforesaid, under the seal of the United States, and duly tested by the President of the United States, according the form of the statute in such case made and provided, wherein and whereby was granted to the plaintiff, his heirs, administrators, or assigns, for the term of fourteen years from the twenty-sixth day of September, one thousand eight hundred and thirty-five, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said new and useful improvement, agreeably to the statutes of the United States in such case made and provided, as by the said letters patent in court to be here produced, reference being thereunto had for a specification of the improvement, will fully appear. And the plaintiff further says, that he, the said plaintiff, did always, from the time of the making and granting of the said letters patent as aforesaid, exercise, use, and enjoy the right, liberty, and privilege aforesaid, to wit, at the district aforesaid, and has exercised, used, and enjoyed the same right and liberty to the day of the purchase of this writ, to his great profit and advantage, to wit, at the district aforesaid, and in that respect, has made and used, and vended to others to be used, the said improvement, to his great profit and advantage, to wit, at the district aforesaid. Yet, the defendants, well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the plaintiff, and to deprive him of the profits, benefits, and advantages, which he might, and otherwise would have derived and acquired from the exclusive making, using, and vending the said new and useful improvement, after making the said letters patent, and within the term of years in the said letters patent mentioned, to wit, at the district aforesaid, on the first day of January, in the year one thousand eight hundred and thirty-seven, and at divers other days and times between that day and the purchase of this writ, did make and devise, and, having made and devised, did sell the new and useful improvement unlawfully and unjustly, without the consent, in writing, but against the will of the plaintiff, in breach of the aforesaid letters patent, and in violation and infringement of the right, privilege, and liberty so as aforesaid granted to the plaintiff, and contrary to the form and effect of the statutes aforesaid in such cases made and provided, whereby the plaintiff hath been, and is greatly injured and deprived of great profit, which otherwise he might, and would have derived and acquired from his, the said new and useful improvement; and, by reason of the defendants making, devising, and vending the same as aforesaid, without consent as aforesaid, the plaintiff says he

has sustained actual damage, to wit, the sum of thirty thousand dollars, whereby, and by force of the statutes of the United States aforesaid, an action hath accrued to the plaintiff to recover the sum of ninety thousand dollars, being three times the actual damage sustained by the plaintiff as aforesaid. Yet the defendants, although often requested by the plaintiff, have never paid the same, but have refused, and still do refuse to pay the said sum to the plaintiff, to his damages one hundred thousand dollars, &c.

And also for that the plaintiff was the true and original inventor of a certain new and useful improvement in the mode of turning short curves on rail-roads, in the letters patent hereinafter mentioned fully described, which was not known or used before the time of his application for a patent as hereinafter mentioned; and the plaintiff being so as aforesaid, the inventor thereof, and being also a citizen of the United States, on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and thirty-five, upon due application therefor by the plaintiff, the Secretary of State of the United States caused letters patent to be issued in the name of the United States, bearing date at Washington, the day last aforesaid, under the seal of the United States, and duly tested by the President of the United States, according to the form of the statutes in such case made and provided, whereas and whereby was granted to the plaintiff, his heirs, administrators or assigns, for the term of fourteen years, from the twenty-sixth day of September, in the year of our Lord, one thousand eight hundred and thirty-five, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said new and useful improvement, agreeably to the statutes of the United States, in such cases made and provided, as by the said letters patent to be in court here produced, reference being thereunto had for a specification of the improvement, will more fully appear. And the plaintiff further says, that he, the said plaintiff, did always, from the time of making and granting said patent as aforesaid, exercise use and enjoy, the right, liberty and privilege aforesaid, to wit, at the district aforesaid, and has exercised, used and enjoyed the same right, privilege and liberty, until the day of the purchase of this writ, to wit, to his great benefit and advantage and profit, to wit, at the district aforesaid. Yet the defendants, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiff and deprive him of the benefit, profit and advantage, which he might and would have otherwise derived and acquired from the exclusive making, constructing and using and vending the aforesaid new and useful improvement, after the making of the said letters patent, and within the term of years mentioned within the said letters patent, to wit, at the district aforesaid, on the first day of January, one thousand eight hundred and thirty-seven; and at divers other days and times between that day and the purchase of this writ, did devise, use and sell the said new and useful improvement unlawfully and unjustly, without the consent, in writing, and against the will of the plaintiff in breach of the aforesaid letters patent, and in infringment of the right and liberty, so as aforesaid

granted to the plaintiff, and contrary to the form and effect of the statutes aforesaid in such case made and provided; whereby the plaintiff hath been and is greatly injured and deprived of great profit, which otherwise he might and would have acquired from his, the said new and useful improvement; and by reason of the defendants devising, using and vending the same aforesaid without consent as aforesaid, the plaintiff says he has sustained actual damages, to wit, the sum of thirty thousand dollars, whereby and by force of the statutes of the United States aforesaid, an action hath accrued to the plaintiff to recover the sum of ninety thousand dollars, being three times the actual damage sustained by the plaintiff as aforesaid. Yet the defendants, although often requested by the plaintiff, have never paid the same, but have refused and do still refuse to pay the said sum to the plaintiff, to his damages one hundred thousand dollars, &c.

And also for that the plaintiff was the true and original inventor of a certain new and useful improvement in the mode of turning short curves on railroads, in the letters patent hereinafter mentioned fully described, which was not known or used before the time of the said plaintiff's application for a patent as hereinafter mentioned, and the plaintiff being as aforesaid the inventor thereof and a citizen of the United States, on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and thirty-five, upon due application therefor by the plaintiff, the Secretary of State of the United States caused letters patent to be issued in the name of the United States, bearing date at Washington the day last aforesaid, under the seal of the United States, and duly tested by the President of the United States, according to the forms of the statutes in such case made and provided, wherein and whereby was granted to the plaintiff, his heirs, administrators or assigns, for the term of fourteen years from the twenty-sixth day of September, one thousand eight hundred and thirty-five, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said new and useful improvement according to the statutes of the United States in such case made and provided, as by the said letters patent in court to be here produced, reference being thereunto had for a specification of said improvement, will more fully appear.

And the plaintiff did always, from the time of the making and granting of the said letters patent as aforesaid, exercise, use and enjoy the right, liberty and privilege aforesaid, to wit, at the district aforesaid; yet the defendants, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiff, and deprive him of the profits, benefits and advantages, which otherwise he might and would have derived and acquired from the exclusive making, constructing using and vending the aforesaid new and useful improvement after the making of the said letters patent; and within the term of years in said letters patent mentioned, to wit, at the district aforesaid, on the first day of January, in the year, one thousand eight hundred and thirty-seven, and at divers other days and times, between that day and the purchase of this writ, did make, devise and use the said new

and useful improvement unlawfully and unjustly, without the consent in writing, and against the will of the plaintiff, in the breach of the aforesaid letters patent and infringement of the right and liberty, so as aforesaid granted to the plaintiff, and contrary to the form and effect of the statutes aforesaid in such case made and provided; whereby the plaintiff hath been and is greatly injured and deprived of great profits, which otherwise he might and would have acquired and derived from his, the said new and useful improvement; and by means of the defendants making, devising and using the same as aforesaid, without consent as aforesaid, the plaintiff says he has sustained actual damage, to wit, the sum of ninety thousand dollars, whereby and by force of the statutes of the United States aforesaid, an action hath accrued to the plaintiff, to recover the said ninety thousand dollars. Yet the defendants, although often requested by the plaintiff, have never paid the same, but have refused and still do refuse to pay the said sum to the plaintiff, to his damage one hundred thousand dollars, &c.

And also for that the plaintiff was the true and original inventor of a certain new and useful improvement in the mode of turning short curves on railroads, in the letters patent hereinafter mentioned fully described, which was not known or used before the time of said plaintiff's application for the patent as hereinafter mentioned; and the plaintiff being, so as aforesaid, the inventor thereof, and a citizen of the United States, on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and thirty-five, upon due application therefor by the plaintiff, the Secretary of State of the United States caused letters patent to be issued in the name of the United States, bearing date at Washington, the day and the year last aforesaid, under the seal of the United States, and duly tested by the President of the United States, according to the form of the statutes in such case made and provided, wherein and whereby was granted to the plaintiff, his heirs, administrators, or assigns, for the term of fourteen years from the twenty-sixth day of September, one thousand eight hundred and twenty-five, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said new and useful improvement, agreeably to the statutes of the United States, in such case made and provided, as by said letters patent to be in court here produced, reference being thereunto had for a specification of said improvement, will more fully appear.

And the said plaintiff further says that he did always, from the time of the making and granting of said letters patent, as aforesaid, exercise, use, and enjoy the right, privilege, and liberty aforesaid, to wit, at the district aforesaid; yet the defendants, well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the plaintiff, and deprive him of the advantages, benefits, and profits which he might and otherwise would have derived and acquired from the exclusive making, constructing, using, and vending the aforesaid new and useful improvement, after the making of the said letters patent, and within the term of years in the said letters

patent mentioned, to wit, at the district aforesaid, on the first day of January, in the year one thousand eight hundred and thirty-seven, at *at* divers other days and times between that day and the purchase of this writ, did make and use the said new and useful improvement in the mode of turning short curves on railroads, unlawfully and unjustly, and without the consent in writing, but against the will of the plaintiff, and contrary to the form and effect of the statutes in such case made and provided, whereby the plaintiff has been, and is greatly injured and deprived of great profits, which otherwise he might and would have derived from his new and useful improvement; and by reason of the defendants making and using the same as aforesaid, the plaintiff says he has sustained actual damages, to wit, the sum of ninety thousand dollars, whereby and by force of the statutes of the United States, an action hath accrued to the plaintiff to recover the sum of ninety thousand dollars. Yet the defendants, although often requested by the plaintiff, have never paid, but have refused, and still do refuse to pay the said sum to the plaintiff, to his damages one hundred thousand dollars, &c.

And also for that the plaintiff was the true and original inventor of a certain new and useful improvement in the mode of turning short curves on railroads, in letters patent hereinafter mentioned fully described, which was not known or used before the time of said plaintiff's application for a patent as hereinafter mentioned; and the plaintiff being so as aforesaid the inventor thereof, and a citizen of the United States, on the twenty-sixth day of September, in the year one thousand eight hundred and thirty-five, upon due application therefor by the plaintiff, the Secretary of State of the United States, caused letters patent to be issued in the name of the United States bearing date at Washington the day last aforesaid, under the seal of the United States, and duly tested by the President of the United States, according to the form of the statutes in such case made and provided, wherein and whereby was granted to the plaintiff, his heirs, administrators, or assigns, for the term of fourteen years, from the twenty-sixth day of September, one thousand eight hundred and thirty-five, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said new and useful improvement, agreeably to the statutes of the United States in such case made and provided, as by the said letters patent to be in court here produced, reference being thereunto had for a specification of the said improvement, will more fully appear. And the plaintiff further says, that he, the said plaintiff, did always, from the time of making and granting said letters patent as aforesaid, exercise, use, enjoy the rights, liberty, and privilege aforesaid, to wit: at the district aforesaid, and has exercised, used, and enjoyed the same right, liberty, and privilege to the day of the purchase of this writ, to his benefit, advantage, and profit, to wit, at the district aforesaid. Yet the defendants well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the plaintiff, and deprive him of the profits, benefits, and advantages that otherwise he

would and might have derived and acquired from the exclusive making, constructing, using, and vending the aforesaid new and useful improvement, after making of the said letters patent, and within the term of years in said letters patent mentioned, to wit, at the district aforesaid, on the first day of January, in the year one thousand eight hundred and thirty-seven, and at divers other days and times between that day and the purchase of this writ, did make and use the said new and useful improvement, and the same did vend and sell, unlawfully and unjustly, without the consent, in writing, and against the will of the plaintiff, in breach of the aforesaid letters patent, and in infringement of the right, liberty, and privilege, so as aforesaid granted to the plaintiff, and contrary to the form and effect of the statutes aforesaid in such case made and provided, whereby the plaintiff has been and is greatly injured and deprived of great profits which otherwise he might and would have acquired from his said new and useful improvement; and by reason of the defendant's making, using, vending, and selling the same as aforesaid, without consent as aforesaid, the plaintiff says he has sustained actual damages, to wit, the sum of thirty thousand dollars, whereby and by force of the statutes of the United States aforesaid, an action hath accrued to the plaintiff to recover the sum of ninety thousand dollars, being three times the actual damages sustained by the plaintiff aforesaid. Yet the defendants, although often requested by the plaintiff, have refused and still do refuse to pay the said sum to the plaintiff, to his damages one hundred thousand dollars, &c.

And also for that the plaintiff was the true and original inventor of a certain new and useful improvement in the mode of turning short curves on railroads, in letters patent hereinafter mentioned fully described, which was not known or used before the time of the plaintiff's application for a patent as hereinafter mentioned; and the plaintiff being so as aforesaid the inventor thereof, and being a citizen of the United States, on the twenty-sixth day of September, in the year of our Lord, one thousand eight hundred and thirty-five, upon due application therefor by the plaintiff, the Secretary of State of the United States caused letters patent to be issued in the name of the United States, bearing date at Washington, the day and year last aforesaid, under the seal of the United States, and duly tested by the President of the United States, according to the form of the statute in such case made and provided, wherein and whereby was granted to the plaintiff, his heirs, administrators or assigns, for the term of fourteen years from the twenty-sixth day of September, one thousand eight hundred and thirty-five, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said new and useful improvement, agreeably to the statutes of the United States in such case made and provided, as by the said letters patent to be in court here produced, reference being thereunto had for a specification of the said improvement, will more fully appear. And the said plaintiff further says that he, the said plaintiff, did always from the time of the making and granting of the said letters patent

as aforesaid, exercise, use and enjoy the right privilege and liberty as aforesaid, to wit, at the district aforesaid, and has exercised and enjoyed the same right, liberty and privilege to the day of the purchase of this writ, to his great benefit, advantage and profit, to wit, at the district aforesaid. Yet the defendants, well knowing the premises, but contriving and wrongfully and injuriously intending to injure the plaintiff and deprive him of the profits, benefits and advantages which he might and otherwise would have derived and acquired from the exclusive making, constructing, using and vending the aforesaid new and useful improvement, after the making of the said letters patent, and within the term of years in the said letters patent mentioned, to wit, at the district aforesaid, on the first day of January, in the year of our Lord one thousand eight hundred and thirty-seven, and at divers other days and times between that day and the purchase of this writ, did use the said new and useful improvement in the mode of turning short curves on railroads, unlawfully and unjustly and without the consent in writing, but against the will of the plaintiff, in breach of the aforesaid letters patent, and in infringement of the right and liberty, so as aforesaid granted to the plaintiff, and contrary to the form and effect of the statutes aforesaid in such case made and provided; whereby the plaintiff hath been and is greatly injured and deprived of great profits, which otherwise he might and would have derived and acquired from his said new and useful improvement; and by reason of the defendants using the same as aforesaid, without consent as aforesaid, the plaintiff says he has sustained actual damages, to wit, the sum of thirty thousand dollars, whereby and by force of the statutes of the United States, an action hath accrued to the plaintiff to recover the sum of ninety thousand dollars, being three times the actual damage sustained by the plaintiff as aforesaid. Yet the defendants, although often requested by the plaintiff, have refused and still do refuse to pay the said sum to the plaintiff, to his damage one hundred thousand dollars, &c.

Wherefore the said plaintiff brings his suit, &c.; and thereupon the said Philadelphia and Trenton Railroad company, by G. Mallary, their attorney, plead not guilty and issue, &c.

Therefore, let a jury come thereupon before the said judges at Philadelphia aforesaid, on the eleventh day of October, 1838; by whom, &c; who neither, &c; to recognize, &c; because as well, &c; the same day is given to the parties aforesaid, then and there, &c; on which said eleventh day of October, A. D. 1838, come the parties aforesaid, by their attornies aforesaid, and afterwards in this same session, to wit, on the twenty-ninth day of October in the same year. The jurors of the jury aforesaid being called, likewise come, to wit: Thomas Pratt, Richard Mackey, Elhanan W. Keyser, Daniel Moore, Thomas B. Town, George W. Page, William A. Snyder, William Piersoll, Jonathan Miller, John J. Krider, George F. Lehman and Johns Hopkins, who are duly empaneled, returned, chosen, tried and sworn or affirmed to speak the truth of the matter within contained; afterwards to wit, on sixteenth day of February, A. D., one thousand eight hundred and thirty-nine, on their oaths and affirmations afore-

said, respectively do say, that they find for the plaintiff, and assess the damages at four thousand two hundred and fifty dollars, with six cents costs. Judgment Nisi. Afterwards to wit, on the day and year last aforesaid, on motion of Mr. Miles for the defendants. Rules to shew cause why a new trial should not be granted.

Afterwards to wit, on the nineteenth day of February, A. D. one thousand eight hundred and thirty-nine, the depositions of William A. Stimpson, Caleb Merrett, Richard Caton and George Nelson are filed in the said court, which said depositions are in the words and figures following, to wit:

William A. Stimpson, a witness produced and examined on the part of the plaintiff in the above two cases, being duly sworn, says: I am a son of the plaintiff; *I never heard the improvement of my father in short curves mentioned till after 10th June*, 1830. *I had been absent in Boston for six months before, and returned to Baltimore about the June*, 1830. *A few days after my return, plaintiff mentioned the invention to me and explained it to consist of the application of the flange of the wheel on the outer circle and the run of the tread on the inner circle; the flange of the wheel on the inner circle to run in a ground rail; this tract lies on the tread of the wheel.* I carried the letter marked A, dated 13th October, 1830, to Mr. Thomas' house, and delivered it there to one of his servants; this was on the day of its date, or it might have been the next day; at the time they were laying down a short curve on plaintiff's plan at the corner of Pratt and Howard streets, in 1832 or 1833. I was present at a conversation between plaintiff and Mr. Elgar; plaintiff asked Elgar what business he had to be interfering with his (plaintiff's) inventions, laying them down or claiming them as his own? Elgar replied, I have not claimed them as my own. Plaintiff then said, you have, both you and Mr. Winans have claimed them. Elgar then said, well, Mr. Stimpson, if you will not believe what I say, I will have no more to say about it. 'Tis no use for me to talk to you, unless you will believe what I say; but I aver that we never have claimed it; we do not claim it, and I don't want it; as for myself I do not consider it patent worthy, as there have already been two patents taken out for the same thing. One in England by James, and one in this country by Wright. Plaintiff replied, it is not the same thing; it is a different application altogether, and no man who values his reputation as a mechanic will say it is the same thing: if it is the same thing; or they think so, let them run theirs and not interfere with mine; that if they run mine, I shall hold them or whoever uses my patent accountable for it. Elgar then said, I am at work for the Baltimore and Ohio Railroad Company, and by their orders, and if any one is to blame it is them and not me; I have nothing to do with it; you had better go and complain to them and not to me.

Being cross-examined, the defendant reserving the right to except to all or any of the foregoing testimony, the witness says: *I distinctly understood my father, after June*, 1830, *to place his invention*

upon these main features, the application of the flange on the outside circle, and the tread in the inner one; in the conversation describing the curves, he spoke of the grooves in connection with the curve; I do not know that he has ever explained, that he claimed the use of grooves as a part of his invention on either circle. I have understood the application of the flan*ch* and the tread on the opposite sides to be the pith of the invention; I know the date of my return home in June, 1830, by dates I have at home. I have not looked at my memorandum book lately, but I know I left Boston on the 1st June, 1830, for home; I remember the very day; I do not pretend to give the very words which took place between my father and Mr. Elgar in the conversation referred to; I only pretend to give the substance.

WM. A. STIMPSON.

Sworn and subscribed the 3d of November, 1838, before me.
JOHN BINNS, *Ald'n.*

Agreed that the foregoing deposition be read in evidence, subject to all legal exceptions.

JNO. MILES, *Deft's Att'y.*

November 3d, 1838.

Caleb Merritt, of the city of Baltimore, a witness produced and examined on the part of the plaintiff, being duly sworn according to law, says as follows:

I know the plaintiff, James Stimpson; my acquaintance with him began in the fall of 1829. I was then following, and have been pretty much ever since, the business of carpentering and pattern making; I made a model, or rather it was made in the shop kept by my partner, Lewis Audon, and myself. He was also a pattern maker; we both worked in making the model. This model was made, showing two streets crossing each other at right angles; it had also a curved way for turning from the one street into the other. It was a curve of a quarter circle. The curved way was made with a groove in the inner circle of the curve. The model was made of wood. The groove was to receive the flange. The bearing of the wheel was on its tread on the part of the rail inside of the inner track; the flange was not to run upon the bottom of the groove; the groove was merely to act as a guide; the outer track of the curve was made to relieve the head of the wheel, and allow the carriage to run on the flange of the wheel on that side. The entire track had a very shallow groove, in which the flange ran so as to elevate the tread of the wheel above the surface of the rail. The outer groove would not act as a guide, but in case of any obstruction by a stone lying in the track, or otherwise, would prevent the car being run off the track. On the inner side of the curve, the wheel ran upon its head; on the other side of the curve, the wheel ran upon its flange. The model went from my shop to go to the Baltimore and Ohio Railroad Company's office; the model was

made, as above stated, for the plt'ff, and by his order and directions. It was commenced early in the spring of 1830; it was finished sometime in the summer of 1830; it laid by some time in my shop, in consequence of pl'tff's being out of town. He superintended its construction himself. I never saw it after it left my shop.

The defendant's reserving the right of exception to the whole, or any part of the foregoing testimony, cross-examines:

There was a drawing in miniature, which I saw in Mr. Stimpson's pocket-book. All that I recollect about the drawing, for the purpose of describing it, was the flange action on the outer circle, though I did not work from it making the model. The model or board on which it was made, was in the neighborhood of 3 feet by 2 feet. Before I commenced this model, I had been doing work for Mr. Stimpson, and I was at work for him then—at work on his horse-car. I also did work, and make models of other things for him afterwards. I cannot say exactly how long before the model left my shop it was commenced; it was some time. I have a book of charges against Mr. Stimpson at home. I have not, to my knowledge, any charges or entries at home, to enable me to fix the date of the commencement of this model. I have a positive recollection it was commenced in the spring, because it followed other work done for Mr. Stimpson. It was work done on his horse-car. I do not know whether my books show the date of that work; they are not with me; they are in the hands of Lewis Audon, in Baltimore, if they are now in existence. It could not have exceeded 3 or 4 days after the horse-car work was completed. The horse-car, I think, was taken from my shop in the early part of the spring; the outer circle was a flat plate, with a light groove near its centre; can't tell the depth of that groove; it was much less than the other; it only raised the bearing of the wheel on the outer circle about 1-8th of an inch; it was intended to free the action of the tread from the rail. I recollect the fact itself, that there was a groove in the inner circle; it was a piece of wood grooved out. There was no car or model of a car in my shop at the time; before this, I had seen the models of several cars. Mr. Stimpson wanted to apply the model of a car which he had to this model. I made two models of cars for him—one before this model of the curve, and one after. The one after was to shew a jointed axle. I have not, since the time this model of the curve left my shop in 1830, up to this date, had any conversations with Mr. Stimpson about the date of its construction; the last conversation I had with Mr. Stimpson was about 12 months ago, more or less. I have not had conversations with any person respecting the time it was made. I was subpœnaed here. When supœnaed, Mr. Stimpson's son came into my shop. I got here on Wednesday morning. Since then, Mr. Stimpson's sons and I have had conversations about the model made in 1830—not about the exact date of its construction. I made a model here, showing a switch.

CALEB MERRITT.

Sworn and subscribed the 3d of November, 1838, before me.

JOHN BINNS, *Ald'n.*

It is agreed that the foregoing deposition be read in evidence, subject to all legal exceptions.

JNO. MILES, *Deft's Att'y.*

November 3d, 1838.

Richard Caton, of the city of Baltimore, a witness produced, sworn and examined, on the part of the plaintiff, in the above two cases, being duly sworn, says: I am acquainted with the plaintiff, and have known him ever since he first came to reside in Baltimore, in the year 1828 or 1829. From the year 1828 to the year 1833, I was not a director of the Baltimore and Ohio Railroad Company, but I was, in some degree, more than a director. During that time, I had frequent intercourse with the president of said Company, Mr. Philip E. Thomas, on the subject of the construction of the road, the difficulties to be obviated in making it, and the affairs of the Company generally. When I say that I was more in the concerns of the Company than a director, I mean that my family had more than one hundred and twenty thousand dollars in the stock of said Company, and I felt much interest in its success, and mingled in the concerns of the Company with zeal and usefulness. I held a large body of lands lying westward of Baltimore, beginning at the city line, and extending ten miles contiguous to the Baltimore and Ohio Railroad, through which land said Railroad passes two miles and upwards. I gave the Company the use of a granite quarry on my land. I gave them, also, the right of laying the railroad over my land for the above-mentioned two miles. I gave them, also, the timber for supporting arches in construction on the route, and many other conveniences: added to this, I have a large interest in a branch railroad, diverging from the Baltimore and Ohio railroad, at the third mile from Baltimore, and terminating at tide-water, opposite to Eutaw street, called South Baltimore. These circumstances made a community of interest between the Company and myself, and often brought me in contact and intercommunication with them and their officers. This is the position to which I allude in calling myself more than a director. Some time in the year 1829, it was contemplated to bring the railroad into the city of Baltimore. I had frequent conversations with the plt'ff on other improvements which he had made; among the rest, was a wagon propelled by horses inside of the wagon. Plaintiff was desirous of trying this carriage on the railroad. He applied to me to ask permission for that purpose from the President of the Baltimore and Ohio Railroad Company, Mr. Thomas, which I did, and obtained the permission. 'Twas used in 1829 and 1830. Whilst the experiment with the horse-car aforesaid was making, the period arrived when it became necessary for the Company to bring their carriages into town to their depot. *During these experiments, I had frequent conversations with plaintiff, and with Mr. Thomas, on the subject of turning the angles at the corners of the streets. In* 1830, *the subject of turning these angles was frequently conversed about between plaintiff and myself, and between Mr. Thomas and myself. Mr. Stimpson, the*

plt'ff, communicated to me that he had made a discovery which would be very useful to the said Company, and he should like to have an opportunity of laying it before the Board of Directors through my instrumentality and my application. On or about the 13th October, 1830, a letter was addressed by plt'ff. to Mr. Thomas, pursuant to an arrangement made between Mr. Thomas and myself, that a model of the plaintiff's invention should be laid before the Board of Directors. This is the letter, (marked A;) I can identify it by writing of mine upon the paper. This letter and a model of pltff's invention for turning a corner, (by means of the outer wheels running in their flanges on a flat rail, the inner wheels running in their treads, and with a groove for the flanges,) I delivered to Mr. Thomas; the model was delivered at the office of the Baltimore and Ohio Railroad Company. The model was exhibited to the members of the Board of Directors, and to the persons connected with the construction of the road, and was very much admired by them. The letter and model were delivered as aforesaid, on or about the 13th October, 1830. Those who examined it as above stated, generally expressed their astonishment at its simplicity, and that it should never have been known before. The model remained in the office of the said Company for many months. At length, it was removed out of the office, and put in the common passage, where every body must have seen it, who came in. While in the office, it was openly exposed on a table, and, being an entire novelty, attracted a great deal of attention and admiration. It remained there many months—perhaps a year. I afterwards applied to have it returned to Mr. Stimpson. *Plt'ff had spoken to me, and described his invention as aforesaid, (the model of which I have above spoken of,) a long time before the 13th October,* 1830—*to the best of my recollection, twelve months before that time. When it was first communicated to me by plt'ff., I regarded it as an entirely new thing, and was much struck by its simplicity and beauty. My nephew, William Woodville, was, at that time, an officer of the said Company, and expressed his astonishment at it, and at the stupidity of mankind in not discovering so simple a thing before. He had himself been endeavoring to invent some plan for turning corners on railroads. I myself have paid a great deal of attention to mechanical science.* While the model was in the office as aforesaid, I was in the habit of seeing the different officers of the Company about the office. I often saw Mr. Jonathan Knight, and sometimes Mr. Ross Winans, at the office, while said model was there. I did not see Mr. Elgar so often, as he was there in a subordinate situation. I examined that model particularly in company with said Knight. I recollect that he saw it, and expressed his admiration of it to me; he said it was a beautiful idea, or something of that kind. Mr. Thomas frequently expressed his admiration of it. I never heard it suggested by any body, that the invention was not the plaintiff's, until after the publication of the 5th report of the Baltimore and Ohio Railroad Company, in October, 1831. That report stated that one had been actually put into operation at Ellicott's Mills; I saw the one at Ellicott's Mills day by day,

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JNO. MILES, *Deft's Att'y.*

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Richard Caton, of the city of Baltimore, a witness produced, sworn and examined, on the part of the plaintiff, in the above two cases, being duly sworn, says: I am acquainted with the plaintiff, and have known him ever since he first came to reside in Baltimore, in the year 1828 or 1829. From the year 1828 to the year 1833, I was not a director of the Baltimore and Ohio Railroad Company, but I was, in some degree, more than a director. During that time, I had frequent intercourse with the president of said Company, Mr. Philip E. Thomas, on the subject of the construction of the road, the difficulties to be obviated in making it, and the affairs of the Company generally. When I say that I was more in the concerns of the Company than a director, I mean that my family had more than one hundred and twenty thousand dollars in the stock of said Company, and I felt much interest in its success, and mingled in the concerns of the Company with zeal and usefulness. I held a large body of lands lying westward of Baltimore, beginning at the city line, and extending ten miles contiguous to the Baltimore and Ohio Railroad, through which land said Railroad passes two miles and upwards. I gave the Company the use of a granite quarry on my land. I gave them, also, the right of laying the railroad over my land for the above-mentioned two miles. I gave them, also, the timber for supporting arches in construction on the route, and many other conveniences: added to this, I have a large interest in a branch railroad, diverging from the Baltimore and Ohio railroad, at the third mile from Baltimore, and terminating at tide-water, opposite to Eutaw street, called South Baltimore. These circumstances made a community of interest between the Company and myself, and often brought me in contact and intercommunication with them and their officers. This is the position to which I allude in calling myself more than a director. Some time in the year 1829, it was contemplated to bring the railroad into the city of Baltimore. I had frequent conversations with the plt'ff on other improvements which he had made; among the rest, was a wagon propelled by horses inside of the wagon. Plaintiff was desirous of trying this carriage on the railroad. He applied to me to ask permission for that purpose from the President of the Baltimore and Ohio Railroad Company, Mr. Thomas, which I did, and obtained the permission. 'Twas used in 1829 and 1830. Whilst the experiment with the horse-car aforesaid was making, the period arrived when it became necessary for the Company to bring their carriages into town to their depot. *During these experiments, I had frequent conversations with plaintiff, and with Mr. Thomas, on the subject of turning the angles at the corners of the streets. In* 1830, *the subject of turning these angles was frequently conversed about between plaintiff and myself, and between Mr. Thomas and myself. Mr. Stimpson, the*

plt'ff, communicated to me that he had made a discovery which would be very useful to the said Company, and he should like to have an opportunity of laying it before the Board of Directors through my instrumentality and my application. On or about the 13th October, 1830, a letter was addressed by plt'ff. to Mr. Thomas, pursuant to an arrangement made between Mr. Thomas and myself, that a model of the plaintiff's invention should be laid before the Board of Directors. This is the letter, (marked A;) I can identify it by writing of mine upon the paper. This letter and a model of pltff's invention for turning a corner, (by means of the outer wheels running in their flanges on a flat rail, the inner wheels running in their treads, and with a groove for the flanges,) I delivered to Mr. Thomas; the model was delivered at the office of the Baltimore and Ohio Railroad Company. The model was exhibited to the members of the Board of Directors, and to the persons connected with the construction of the road, and was very much admired by them. The letter and model were delivered as aforesaid, on or about the 13th October, 1830. Those who examined it as above stated, generally expressed their astonishment at its simplicity, and that it should never have been known before. The model remained in the office of the said Company for many months. At length, it was removed out of the office, and put in the common passage, where every body must have seen it, who came in. While in the office, it was openly exposed on a table, and, being an entire novelty, attracted a great deal of attention and admiration. It remained there many months—perhaps a year. I afterwards applied to have it returned to Mr. Stimpson. *Plt'ff had spoken to me, and described his invention as aforesaid, (the model of which I have above spoken of,) a long time before the 13th October, 1830—to the best of my recollection, twelve months before that time. When it was first communicated to me by plt'ff., I regarded it as an entirely new thing, and was much struck by its simplicity and beauty. My nephew, William Woodville, was, at that time, an officer of the said Company, and expressed his astonishment at it, and at the stupidity of mankind in not discovering so simple a thing before. He had himself been endeavoring to invent some plan for turning corners on railroads. I myself have paid a great deal of attention to mechanical science.* While the model was in the office as aforesaid, I was in the habit of seeing the different officers of the Company about the office. I often saw Mr. Jonathan Knight, and sometimes Mr. Ross Winans, at the office, while said model was there. I did not see Mr. Elgar so often, as he was there in a subordinate situation. I examined that model particularly in company with said Knight. I recollect that he saw it, and expressed his admiration of it to me; he said it was a beautiful idea, or something of that kind. Mr. Thomas frequently expressed his admiration of it. I never heard it suggested by any body, that the invention was not the plaintiff's, until after the publication of the 5th report of the Baltimore and Ohio Railroad Company, in October, 1831. That report stated that one had been actually put into operation at Ellicott's Mills; I saw the one at Ellicott's Mills day by day,

as it was in the course of construction; I supposed it was being made under pltff's direction; I never, for a moment, suspected that it was not, or that his claim to the invention was denied or questioned; my frequent intercourse with the officers of the Company continued at that time, and until 1835 at least.

The parts of the letter of 13 October, 1830, (marked A,) which are cancelled and erased, were not printed or published. The newspaper now produced, (marked B,) is the publication to which I referred, dated February 9, 1831. The reason the letter was shortened was to get it easier into the paper. This letter was in the possession of the board from about the date of the letter till near the date of the newspaper. I often told plaintiff that he ought to secure his inventions by patent. I do not remember the time at which the railroad was brought into the depôt in the city. I think it was not before 1833. This diagram (marked C,) was made in my office by Mr. Woodville before the letter to Mr. Thomas above spoken of. It was done at my desk. It is a drawing of plaintiff's invention.

The defendants reserving the right to except to all and any part of the foregoing testimony, cross-examined.

Mr. Thomas, formerly president of the company, is now living in Baltimore. After I got the model on a board back from Mr. Thomas, at the request of Mr. Stimpson, I gave it to the latter; what he has done with it I don't know. I gave it to Mr. Stimpson from 8 to 12 months after the date of the letter to Mr. Thomas of October, 1830. The model was an imitation of what is in reality now in use. I don't recollect that the model was accompanied by a car. I have had no conversation with Mr. Stimpson about the disposition of it since. I never saw but that one model. I saw the model, and saw one in practical use; they appeared to be similar. The first one I saw constructed in practical use was in 1831, at Ellicott's Mills. I never saw it otherwise than the groove upon the inner circle and the plane on the outer.

Question. Have you a distinct recollection of the fact as to whether the groove on the model was on the inner and smaller circle?

Answer. I don't know that I could swear to such a fact, but my perfect confidence is that the groove was on the smaller circle, and the same answer applies to the curve at Ellicott's Mills. (Witness looks at page 8 of the letter *A*, and says: I am not sufficiently acquainted with the application of the sentence thereon, having the words "turned by the flange of the wheel running upon the bottom of the groove in the outer rail" to explain it. This paper is, with the exception of the alterations in the hand writing of Mr. George Nelson, copied by him from a rough draft written by Mr. Stimpson. Mr. Nelson was employed in my office at the time. I do not know where the draft written by Mr. Stimpson is; he probably has it. I had no occasion to compare the rough draft prepared by Mr. Stimpson with the copied paper of Mr. Nelson marked A, *when I say that previous to the 13th of October*, 1830, *the plaintiff had spoken to me, and described his invention about 12 months before that time. I speak*

to the best of my recollection as to the time. I had no motive at that time to fix a date. In regard to my using the words "spoken to me and described his invention," I do not mean to say that Mr. Stimpson spoke of more than a general principle, by which he said he could accomplish the object. I do not recollect his entering into details, or particularly describing his invention or its principle or application. It was a transient conversation. I had confidence in Mr. Stimpson's ability, so as to believe that he would accomplish the purpose. There was nothing entered into descriptive as to its mode of operation, but merely a general statement of the end. I cannot particularly specify a date at which Mr. Stimpson first particularly described his invention to me. It was described to me long before it was given to Mr. Thomas; I cannot say how long. I can only speak of his particularly describing the groove upon the smaller circle to me, by my knowledge of the necessity of the existence of such thing. I only recollect his description as it applies to using the flange so as to increase the size of the periphery of the wheel on the larger or outer circle to effect the object of going round the curve. When Mr. Knight saw the model in the office, and said it was a pretty idea, or something of that kind, it was shortly after October, 1830. I have no recollection of any conversation between Messrs. Winans and Elgar about the model in the office. The experiments of Mr. Stimpson with his horse car were, to the best of my recollection, in 1829 or 1830, on the Baltimore and Ohio Railroad.

Re-examined.—The curved way at Ellicott's Mills is for the use of the mills. It is not part of the B. and O. Railroad; it turns off from it to the mills. On further recollection, I believe, though I am not positive, that the model above spoken of, deposited in the office of said company, was accompanied by a car.

RICHARD CATON.

Sworn to and subscribed before me this second day of November, 1838.

JOHN BINNS, *Ald.*

It is agreed that the foregoing deposition shall be read in evidence on the trial of the two cases named, or either of them, subject to all legal exceptions.

JNO. MILES, } *Def'ts Att'ys.*
G. MALLORY, }

2d November, '38.

George Neilson, of the city of Baltimore, a witness produced and examined on behalf of the plaintiff in the above two cases, being duly sworn, says: I first became acquainted with pl'ff in 1828. *The first knowledge I had of his invention of a curved way for railroads was late in the winter of* 1829, *or very early in the year* 1830. *At that time* (1829–'30) *I was a good deal with pl'ff, copying MSS. for him, and he explained to me his plan for introducing railways into cities. This invention of his of curves for turning the corners of streets was*

one part of his plan. He explained to me at that time, towards the end of 1829 *or beginning of* 1830, *the whole system of his invention for short curves; the curve to be turned by the wheels running on their flanges on the outer circle, just as it is now in use.* He afterwards had the model made by Audon and Merritt. The letter from pl'ff to Mr. Thomas, dated 13th October, 1830, (marked A,) is the original letter sent to Mr. Thomas; it was copied by me from the original draft in pl'ff's handwriting. I was very intimate with Mr. Woodville, then an officer of the Baltimore and Ohio Railroad Company. Before the date of the aforesaid letter, marked A, I told Mr. Woodville I would let him into a secret—a very simple mode, invented for turning the corners of streets with a railway, which was about to be communicated to the company. I then explained to him the invention of pl'ff for short curves, and told him pl'ff was the inventor—on that explanation Mr. Woodville made the drawing marked C, at my desk in my presence. As soon as he had made the drawing and calculations, he said it would do. It was very strange it had not occurred to him. This was some days after the date of said letter. The drawing, marked C, has been in my possession ever since, until within a few days past. Pl'ff communicated this invention to me as his own. I had never heard of it before. Some time after the letter was sent—some months afterwards, pl'ff told me that he had found out that Elgar & Winans were stealing his plan—were laying down a curved way on his plan, or making experiments on it. I saw pl'ff's model of a curved way and the crossings of streets at Audon's & Meritt's shop while it was making, and afterwards at pl'ff's house, and afterwards often at the Baltimore and Ohio Railroad Company's office. It lay in the passage there a long time. I don't know what has become of it. *I have heard it was broken up.* I can't speak positively as to whether Stimpson told me Elgar & Winans were stealing his plan before or after his patent was issued.

The defendants reserving the right to except to all or any part of the foregoing testimony, cross-examine:

I understood yesterday from Mr. Stimpson's son that the model which was sent to the Baltimore and Ohio Railroad office was broken up to make other models—did not say when. Mr. Stimpson's plan, when he first spoke to me, as *applicable to the curves, was that the flanges on both sides were to run in grooves in a plate, level with the surface of the street, but the groove of the outer circle was to take the bottom of the flange. He so described it to me. The inner wheel ran on its tread.* Don't think he explained how far the tread of the wheel on the outer circle would be elevated above the rail. I heard that Mr. Stimpson's family came to Baltimore in December, 1829, and it was very shortly after that, in cold weather, that he made the communication. I am not able to fix a precise date as to when the model was begun or finished. *I have a distinct recollection that the groove was also on the inner circle. All his plans for the introduction of the railway into the city, whether on straight lines or curves, were for the use of grooves in both rails. The road is introduced into the*

city by rails elevated above the surface. When Mr. Stimpson described his invention to me, he described the running of the flange upon the outer circle as being the main feature and principle of his invention. I do not know whether or not he mentioned the groove on the inner circle as indispensable to his plan. I don't know whether he explained this. I am married to a niece of Mr. Stimpson.

GEORGE NEILSON.

Sworn and subscribed the 3d of November, 1838, before me.

JOHN BINNS, *Alderman.*

It is agreed that the above deposition be read in evidence, subject to all legal exceptions.

JOHN MILES, *Defendant's Attorney.*

Whereupon for that the court here are not yet advised to give their judgment of and upon the premises aforesaid, day is thereupon given to the parties aforesaid, to hear their judgment thereupon, until the 11th day of April next.

Afterwards, to wit, on the sixth day of May, A. D. 1839, a remittitur is entered by the attorney for plaintiff, on the docket of the said court, for the sum of one thousand dollars of the verdict, leaving the judgment for $3,250 and costs.

Afterwards, to wit, at a session of the same court, holden at Philadelphia aforesaid, before the judges aforesaid, on the 7th day of May in the year last aforesaid, come the parties aforesaid, by their attornies aforesaid. Whereupon all and singular the premises being seen and fully understood by the court here, and mature deliberation being thereupon had, for that it appears to the court here, &c. Rule to show cause why a new trial should not be granted, discharged. And it is considered and adjudged by the court here, that the said James Stimpson recover against the said Philadelphia and Trenton Railroad Company as well the said sum of three thousand two hundred and fifty dollars, by the jury aforesaid, in form aforesaid, assessed for his damages which he had sustained by occasion of the premises, as the sum of , by the court now here adjudged to the said James Stimpson, for his costs and charges by him, about his suit, in this behalf, expended, to be levied of the proper goods and chattels of the said Philadelphia and Trenton Railroad Company, and the said P. and T. Railroad Co. in mercy, &c.

And the defendants having excepted to the said judgment, the judges, at their instance, affixed their seal to this bill of exceptions, in order that a writ of error may be prosecuted according to law, in the premises.

Be it remembered, That in the the term of A. D. came James Stimpson into the circuit court of the United States for the third circuit and eastern district of Pennsylvania, impleaded the Philadelphia and Trenton Railroad Company in a certain plea of

trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendants pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid, before the honorable Joseph Hopkinson, one of the judges of said court, on the day of A. D. 18 , the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impanelled (prout list of jurors,) at which day came as well the said plaintiff as the said defendant by their respective attorneys, and the jurors of the jury aforesaid impanelled to try the said issues being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff, to maintain the issue on his part, offered in evidence the letters patent of the United States to the said plaintiff, dated the 26th day of September, A. D. 1835, (prout the copy of the same); and also a certificate from the patent office of the copy of the original drawing, dated October 8th, A. D. 1837, (prout the same.) And the counsel for the defendants did then and there object that the same was not good and lawful testimony to be received by the said judge, and to be heard by the said jury, and insisted that the same should not be heard. But the said judge did then and there overrule the said objections, and did deliver his opinion and adjudge that the said testimony should be received and read to the said jury. And thereupon the counsel for the said defendants did then and there except to the said opinion and judgment of the said judge, and inasmuch as the same so excepted to do not appear upon the record, the said counsel for the defendants did then and there tender this bill of exceptions thereto, and requested the seal of the judge aforesaid should be put to the same according to law. And thereupon the said judge, at the request of the said counsel for the defendant, did put his seal to this bill of exceptions, according to law.

And the said counsel for the said plaintiff, further to maintain the issue on his part, called William Norris, jr., who being duly sworn, testified, viz:

William Norris, Jr., sworn, pro plff.

"The improvement of James Stimpson is used by defendants at Willow and Front street, and Stone Bridge and Front street. I think also used corner of Maiden street and *Frankford road*. Do not know of any inside of depot. It is a highly useful improvement. I think in the present state of the Trenton railroad, impossible to do without it. Indispensable for use in streets in town. Prefer this improvement. Do not know how long seen there. We call it the Trenton railroad; it goes by that name. I do not know this improvement was known or used before this patent of Stimpson's. It might have been in use or known before R. Rds. First time I saw it in Baltimore, on Ohio R. Rd. three or four years ago; always known as Stimpson's imp't; I have not examined into the merits of question of this improvement."

And here the said counsel for the plaintiff closed the testimony on his behalf.

And then and there the counsel of the said defendants, to maintain the issue on their part, called as witnesses the following persons, who, in the order set down respectively, being sworn or affirmed, testified as follows, to wit:

Jonathan Knight aff. pro def'ts.

I was the engineer of the Baltimore and Ohio railroad. I was chief engineer first January, 1830, and continued to the present time. I was in service of Co. before, in another capacity.

This is the plan of J. Elgar's improved switch and turnout (5th annual report of Baltimore pres. pa. 102; *Elgar's report*, *Sept.* 30, 1831.) This was first put down in 1830; time of the year I cannot say. I was not satisfied of its utility until after, in 1831.

Elgar, in his report of year previous, spoke of it. I am acquainted with turnouts from one side to the other by use of flange, claimed by Stimpson. Also of the curved way on the operation of the flange to turn the carriage. What it is? An. In the construction of turnout &c.

The principle of action in turning short curves was that the flange turned on the long rail; the wheels on the long rail run on the flanges and on the inside on their bearings. That is the principle to overcome greater length on *outer rail.*

That *same principle* was brought into action in Elgar's turnout; the flange action on the outer side, and the switch on the inner side, forming a guide or groove. Change of direction of the car, same principle of action, was brought into use. Don't know how many turnouts put down in 1830. Put down, in 1830, to go from one track to another, and from one sideway to another. Outer wheel brings periphery longer into action than if on common tread. That brings the conicle principle into effect. (Explains the effect.) No difference between *principle* of action, between turnout. The principle appears to me to be identical; *in both*, flange runs outside and flange inside. By extending and lengthening Elgar's turnout this will be the same thing. It was a very important matter with us to make a thing for making short curves. I gave directions for making exp. on this plan in Apl. 1831. Written orders to make experiment at Mount Airy depot, (Apl. 13, 1831.) It was committed to Jacob Small, sup. in court. I gave verbal inst. to others. "In relation" (copy it,) "I should prefer a flat rail for the flange to run upon, to turn radius 47$\frac{1}{0}\frac{0}{0}$ feet on the outside of the tract," &c. &c. Put down tempr. railway to try the experiment. Com. to *Small*, *Elgar*, and *Winans.*" I think the experiments were making at that time, or making it. On my return, 3 June, '31, I addressed a note to Winans requesting to know the result of the experiments. Report Elgar and Winans, 8 July, 1831, of result of exp. made at depot. I was not present at the experiments. The curved exp. way I saw about

my return in 3 June, or possibly before. The exp. curved way was built at the depot at Baltimore, Mount Clair. It was built out in the open air, one line of railway. It is about a mile from the basin, just outside of city. Rails made a very short radius, in pursuance of instructions.

The flange was made to *mount* the outer rail, which was a flat plate, run with its large circumference; on the inside it run in the curve—it run in a groove—*similar to this* both sides.

Another plan was, make the groove on the outside, and flange also on the outside. We finally adopted the flat rail on the outside. We had no experiments to guide us. *Very soon* after July 8, 1831, I ordered the curved way to be laid down at Ellicott's Mills, 13 miles from depot. That curved way was laid down to July, 1831. We pursued the matter as close as we could in order to operate in the streets of the city.

The turn-out was in actual use in 1830 as a part of the rail-way; this superseded the old one, and answered where horse-power was used.

Examined.—I can't say whether the one at Ellicott's. They were at the expense of making it. We planned it. I was not aware of the arrangements made between the Balt. Co. and Stimpson. Dont know what they were. Did not see any plan of Stimpson for this. No switch in Stimpson's. One continuous line of rail-way. It crosses or break the line. Have seen the switch in 1828 or 1829. Dont know how managed by Att'y for Co. Not consulted. This is *Elgar's Report* to me, Sept. 27, 1830, (in 4 Annual Reports) "Roads in," p. 69. It was before the date of this report it had been laid out. My instructions to Elgar and Winans of April, 1831, were given by me without reference to Stimpson or any body else. I considered myself the inventor. The principle of turn-out; and this, too, grew out of a well known principle of conical action.

Ross Winans, sworn, pro dfts.

I went to Baltimore to reside in summer in 1830, I think in June, to assist in arranging and improving their machines. I found Mr. Elgar in employ of Co., employed in laying down turn-outs, &c, to assist in lay'd machinery to promote the pass of car. In 1830, July, Mr. Elgar, myself, and Geo. Brown, a director. Mr. Elgar commenced describing improvements in turn-outs, &c., (conversations objected to.) It was only a little while after the conversation that the turn-out was put down on the plan that was then suggested and talked of. This plan was to form a groove on the right side and the wheel on the left hand side—facilitate the turning by running on the flange. The groove side was shortest side of rail; the flange borne on the outside. Identifies the two descriptions. First one put down in depot in latter part of the summer and fall of 1830. A number laid down on the railroad between upper depot and Ellicott's Mills. I know Mr. Stimpson. In the fall of 1830 Mr. S. was making experiments. I have no documentary evidence, but my im-

pression is fall of 1830. He was making experiments for a machine to carry horse in a body of machine. Experiment did not relate to curved ways, but something else. He poss'd both before and after these experiments. They were put down the morn after I went to Baltimore. In fall of 1830, the employment of a curve of very short radius was spoken of at Ellicott's Mills as required. My attention was called to the fact, and Mr. Elgar, myself, and Mr. William Stattan went to the place for the purpose of devising the best means for the purpose. The road ran along the Patapsco—little space left—various things spoken of—at that time we left it without agreeing on—few weeks after it occurred, by running on the flanges we could accomplish it. I mentioned it to Mr. Elgar. Before he came back from York I put down the model in my upper story of my house; and with a view of making an entire turn-out, and to continue the action of the flange in both ways. It was simply a continuation of the turn-out which had been used. Soon after the model I made a drawing on paper. I have it in my possession—here it is. (This fall, of 1830,) Mr. Geo. Brown went with me and examined it at my house. The next thing was the order of Mr. Knight to make experiments, in spring of 1831, verbally. We laid down a curved way—made various experiments early in spring of 1831. In every experiment we made the wheel on the outer side run on the flange—longer rail—that the ordinary wheel with single bearing and single flange. No act in former wheel. The first experiment was a groove inside rail, or line by another inside rail, outside the flange, inside tread. Various other forms to run the flanges for securing the cars. Experiment was showed, the form and construction of the flange, reg. &c., to a person, or form of machinery. It was near the outward depot, little way off of line of road—public place—in fair view of road—experimental way was usual way—full-sized car. Can't say if I saw Stimpson there. The experiments were satisfactory, and led to the adoption of the curves by the Co. I think, during the summer of 1831 or fall, the principle of action of turn-out and this curved way the same precisely. The grand leading principle or leading feature of the improvement in both cases is the flange on outer side, giving greater diameter, and same mode of diameter. Usual flanch is an inch and a half; whole increase three inches.

Examined Ingle.

I can't say that any individual or identical turn-outs remain in use on the roads. I know that similar ones remain. If taken away or substituted, the casting on which the flange runs wears away. I know that that description wears away. I recollect seeing a board in the office for some time, and stopped a moment with Elgar to see it. I afterwards understood it belonged to Stimpson. I should think it remained a month or two. Can't fix the time. I understood there were arrangements made with the Balt. Co. I heard the Co. paid $5000. The *common switch* is in use—now Elgar's—going in depot

or cities, where rapid motion superseded by English switch. Elgar's switch or turn-out is used in connexion with curves, (alleged Stimpson;) or you may go strait forward. At the time we were making experiment Stimpson was making experiment on horse machine. Don't know of any about the same object. I had frequent conversations with Mr. Stimpson, about the time, about his other improvements. He did not then give me notice that he claimed this, and did not say till after claim on Balt. and Ohio railroad—first knew his claiming to be the inventor in fall of 1831, or spring of 1832. Mr. Stimpson once had a claim for revolving platform. At one time I was consulted—it was old. During the time the suit was pending, I was spoken to about the turn-out or proposed arrangement. I told them I did not think Stimpson had any right. The first curve laid down on that plan was latter part of summer or fall of 1831. Was put down at Ellicott's Mills. I was conferred with while the suit was pending. The curved way at Ellicott's Mills was made by the Agts. of the Co'y—at whose expense I don't know. I only know Mr. Latrobe told me a suit was entered against me.

Re-examined.—I meaned the Elgar turn-out, not the curved way. The first time that I understood that Stimpson had the curved way, was when I also understood that he had patented; some little time after date of patent—positive of that. I was questioned by the att'y of the Balt. and Ohio Co.; not consulted while suit pending. On *board*, in the office, there was a curve, as well as a straight-line tracker. Mr. Elgar was with me; one inquired if we knew what the object of the *bd.* was: we both agreed we did not know.

John Elgar swn. pro def'ts.

The improved switch was suggested by me in July, 1830, to the Baltimore and Ohio Railroad Co.; concluded to try it, and ordered one to be placed in their railroad. They were satisfied, and ordered about a dozen. During that summer and fall, all the way up to Ellicott's Mills. These are switched inside; about a dozen. I know Mr. Stimpson. First time I saw Stimpson on Balt. Railroad was winter of '29 or '30. During the summer, while these turn-outs laid down, he was at his horse-car, trying it.

I became acquainted with the subject in 1826–'7; had a model of a car on short curve, running on a flange; the flange was thick and *square* at the edge. The action is precisely the same. Ross, Winans, Slater, and myself were called up to Ellicott's Mills. That is Nov., 1830.

Two or three weeks after, Winan and myself proposed the greater circle *carrying bridge*, rolling on flange. Some time in winter or spring, we received order to try the exp. The object was to see if horse could pull through the curve. The exp. was tried in spg. of 1831, from Apl. to June, Apl. or May.

(December railway.)—Exp. was made pulling car. Staid for 6 weeks. I saw Mr. Stimpson on ground at time made. Had no con-

versation with Stimpson at that time. Never had any conversation with him about turn-out or curved way until after date of his patent. Mr. Slatter went to Maryland. His health was delicate. Efforts were made to procure his attendance. He was too sick to come on. At conclusion of our exp. I rec'd order to procure our pattern, and lay one down at Ellicott's Mills. I think it was *completed* in Sept. 1831, at Ellicott's. I gave drawings to pattern-maker in August. Little delay. That I saw '26 or '27, was to roll on the flange on the outside, and in on bearing. I have been employed as machinery engineer Balt. and Ohio Railway in Jan'y, 1830. The model is a pretty correct illustration of the subject before the jury. The report signed by me was made by me at the date it bears.

Examined.—I was inventor of single switch on the inside of the curve; rolling of the wheel on the flange on the outside, jointly, Mr. Winans and myself. He was acquainted with the rolling of a flange on a flat surface, for 1826–'7, for purpose of turning short curves.

Had been published by *James*, of England, in 1825. Shortly after I saw the model, I saw the description of James in Fn. Institute Journal. In that model, I got the idea of a frustrum of a cone. Same idea in *James*—same in principle, tho' the form of wheel may be altered. I also understood his patent to be for the rolling of the flange on outside. The model of Stimpson in 1832, at patent office, had a groove; model had James on outside; same principle; a mere change of form of construction. Before I saw his model, I had put the groove myself, in 1830, July, in the switch where the same action. I saw nothing new in his plan; the experimental curved way was exactly same in spring of 1831; that was previous to my knowing of his patent. Nothing new or patentable. I did offer to Stimpson to join with him in obtaining a patent, jointly, for this thing. I said it was not patentable by him because I had done it before; though, in itself patentable, by reason of the inner groove, I should have supposed I would have been entitled to a patent, in connexion with the switch. What need had Mr. Stimpson a right to have patented with him jointly? He may have considered he had a right. I did not know he got his patent first. I offered to join him. I can't speak what his invention is. I can only speak of facts as they are. He had the patent.

I am aware that two individuals may invent and take a joint patent. In 1826 or 7, the model was shown me by Mr. Phineas Davis, of York, Pa. It was talked of then. The model was brass wheels; this is a *flunge*, (Stephen's;) not a double wheel, *thickened flange*. Never saw this in use. *Davis is not living*. I was engaged in building machinery. I was first in employment of B. & O. Road, —previously had been building cars. The curved way on the inside was fall of 1831, Ellicott's Mills, (exclusive of experimental way.) I am not a patentee of *this*—am of other things. I recollect the time when Winans and I posted up a board with common rail tracks—straight, and mode of crossing gutters. I can't fix the time accurately, probably winter of 1830, or 1831. I was not consulted by the

B. & O. about a settlement with Stimpson. I was two or three years with Balt.—then on Columbia Railroad.

Re-examined.—After I had left the Balt. & Ohio Railroad Company, I wrote the letter to Stimpson. I had been laying down a curve in Broad street. He had threatened a suit. I wrote to him that I would join, not to contend, but that if he continued to prosecute me or my friends, I must resist. I rec't a threat of prosecution had been made. Saw pl'ff's model Pat. Office in 1832, when he *had* a patent, shortly after. Don't know of his execution.

I proposed a partnership in the *construction* of these ways, not a part'p in the patent. I thought *I had a right to the thing*, and to the benefit of a share of the profit of the thing; (he had a patent then,) and not in the patent—in the business of construction.

Quest. What were the circumstances of the letter addressed by you to Mr. Stimpson, and when was it?

The offer I made was in 1833 or 1834.

Geo. Gillingham, sworn pro def'ts.

In 1829–30, the double switch was changed to a single switch. About half a mile from the improved part of city. Mouth of depot. Then continued the length of the road. Done by Supt. of Baltimore Railroad. Outer wheel ran on the exterior rail of the flange. Can't say particularly. Operated on the periphery of the rail, not on the flange. Curved way laid down in 1831, completed in latter part of June. I did some part of it. It was at Mount Clair depot. Elgar and Winans. I saw them commence it fore part of June, and complete it; part exterior rail for flange to roll in, the inner rail to run on the groove. My impression of it. Made experiments with it, to test the draught.

Examined.—I was empowered by Geo. Brown, who had the direction, as a smith, to do part of the fixtures. I heard it was experiment. I fix the time by referring to charge in my books.

Michael Glenn, sworn pro def'ts.

The first man I heard speak of the turn-out was John Elgar. There were such switches first laid there. It was, may be, in 1830. I'm not sure. In 1831 I was employed; in 1830 in body cars. I laid it out in an open lot. John Elgar selected me. Had an order from Knight. Tried several curves. This was in April 1831, commenced. There it lays, it is on the model, without the switch. We tried it 40 feet, then 60 feet radius of the curve; usual size of railway and cars. Saw experiments 30 inch wheel, such as used now. Common usual wheel same as placed on the road now.

William Browning, sworn pro def'ts.

I am an iron founder. I cast several wheels of that description; the first charge in my books is Nov. 12, 1830. Cast for Robert L.

Stevens. Cast at 96 N. Moore st. New York, from that pattern, not precisely. They were sent to Hoboken, to be fitted up at Stevens' shop. They were for the railroad: they were thickened. The first castings were made with this rim; the rim and bearing cast together; it is a part of the wheel.

Pierre D Vanransellaer, sworn.

I was in 1830 employed as superintendent in excavating on Camden and Amboy road, near South Amboy. I went there 30th day of December, 1830. In the course of two or three months after this wheel was put into operation, I saw several cars with it; distinct recollection. It is used on roads about the size of the C. and A. track; 3½ centre to centre for hauling dirt. In excavating, it was necessary to form short curves, in forming.

That wheel run on an oak rail with a flat iron bar, 2⅛ by ⅜; we frequently ran on the oak itself. In getting to the curve the highest part of it rested on the higher rail; flange ran on the inner rail. The outer periphery—outside rail—main rail of the road—on the main rail, where no curve, the tread of the wheel bore in. There was but one line on the straight part. The effect was to increase the diameter of the outer wheel—the inner wheel running the same—the principle of curve, and nothing more or less. Single rail inner side—it bore on the tread of that wheel—the flange rested against the inside of the outside rail and prevented slipping off. Large periphery on fall of inner outside rail—4 wheel cars—we did not use them a very great while—we changed the pattern afterwards—it was too light. We used them two or three months, perhaps longer, on this plan. As long as we used them—4 sets. As long as we used that pattern, we used this kind of road. We then afterwards used the common wheel, as exhibited some time in the year 1831, probably in summer. In January, February, or March, the first used. January. After, used common wheel 20 inches in diameter—object below. Did not mount the rail. Don't remember any thing—I saw Stimpson.

Examined.—No very short turns on the road now; at Hoboken, after I quit, we used it for excavating purposes. Never saw one with 1-3 increase of diameter; wheels were loose; they are Cam. and Amboy loose wheels; merely increase the velocity; car propelled by horses; pivots for the purpose of getting into house; tracks do lead into house without the use of platform.

William McConnell swn. pro def'ts.

On Balt. and Ohio R. Rd., I worked in company, and for John Elgar; went in spring of 1830; all 2 mos. I went out till Ellicott's Mills. The contractor put in a turn-out or two; after that, I put it in. The first fixed switch was put in by def'ts, 1830, in summer. In the course of the fall, put in 10, 12, or 14, to Ellicott's Mills. The flange ran on the castings 5 feet, then 7. Flange of a large

curve and the switch formed the groove to guide it on the fixed switch castings. I laid the sidings on the Columbia Railroad; the wheels operate in both the turn-outs, and the curved way the same. I don't see any difference in the action of both; under contract when I went, then date of opening; opened 22d Feb'y, 1830, B. and O. Road.

Examined.—Sidings the same, and also was done in 1830. Worked at the curved way in 1831, at Ellicott's Mills, from the beginning, under Jas. Elgar. They built a bridge over the Petapsco, to get to their flour mill, and the way to get at it was by this curve; leads into their mill across covered mill; private, for the use of the mill. I think there was a gate to shut it up.

Re-examined.—The curved way was to bring the business of the mill, by the cars, flour, 6 or 7, to.

Henry R. Campbell swn. pro defi's.

I am an engineer; been so about 11 years; been engaged in making railroads. I have seen Elgar's switch and turn-out. I am acquainted with curved way, 60 feet radius. The course of the car is directed from a straight track to the other by the flange rolling on one, and the switch on the other. It is only to the inside wheel rubbing against its flange by the switch, and the running on the flange increasing the diameter, forming part of the cone. First part of a turn is generally curved; short turn-outs, where curves between castings; flange don't operate in that way; as far as the casting and switch goes, the wheel takes the flange. The curved way is the same principle of action as the turn-out, as far as casting goes, differing in one part, and switch loose. There is no particular difference in that, as the way is not necessary to have them loose. The inside switch for the turn-out and the castings are made upon the same pattern. I am subpœnaed here by both parties. If the wheel is loose, the cone of the wheel will be lost. It must be a fixed axle. The loose wheel is to prevent slipping. This outer wire (Stevens) is the flange, in fact, made wider, but, in fact, the same thing. This of Stevens differs from the other by having the guide on outer outside, instead of inner. These curves must have guides to resist. No difference if in or out—the inside the best. I am acquainted with Mr. Wright's invention, of Columbia. Mr. Wright's was, at first, a wheel of two diameters, more beside the flange; two cones and a flange. The model I saw in Lancaster, in 1829, the two diameters were to overcome curves; the inside was on the small diameter; outside, the larger one; it was changing the diameter—the principle the same—not the application. I never said on his first patent.

Examined.—The Trenton Railroad has a switch at the junction of the Willow Street Railroad. In Broad street, they have switches. It is better to put the groove on the inside. It is going in use in Broad street. I have never been *con*structed. I never knew the cone claimed as to running on curve except till Wright's patent. I never saw an old wheel prior to 1828, conical—depended on wheels.

I never saw the Baltimore switches. I made one from the description in report, in 1832.

Re-examined.—Only have a switch at depot; whole road; stone bridge; a curved way. I alluded to conical forms, single tread; that was the last.

Josiah White affi'd.

I made a single switch for the Mauch Chunk railroad in 1827. It had a groove on the one side and it run on the other on a flange, for crossing. I first saw a groove for a flange to run in on the Mauch Chunk railroad.

And the said counsel for the defendants did then and there offer, and desire to be permitted to put to the said witness the following question, to wit: "Describe it?"

And the said counsel for the plaintiff did then and there object to the same being put to the witness, and insisted that his answer thereto was not good and lawful testimony. And the said judge did then and there deliver his opinion, and adjudge the said question should not be put to the said witness, and that he should not answer thereto. And the counsel for the defendants did then and there except to the last aforesaid opinion and judgment of the said judge; and inasmuch as the same so excepted to does not appear on the record, the counsel for the defendants did then and there tender this bill of exceptions thereto, and requested the seal of the judge aforesaid should be put to the same, according to law. And thereupon, the said judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions according to law.

I know the operation of Elgar's switch and turnout; its mechanical principle of action. The switch is made to determine the direction of the wagon, whether to go to the right or left, without which it would go in a direct line. The wheel outside runs on the flange, for the purpose of guiding.

Flange inside and guide in curve, and wheel outside on flange. No difference in principle, or application of principle. The working of the whole thing is the same in both cases. Stephens' outside produces same effect as Elgar's switch. Produces same effect; same principle in all three. New plan introduced to-day. There is a curve in the plan.

Coffin Colkett sworn.

I am a contranctor on railroads. I am acting with Elgar. Laid the part or good many of them down. I assisted in putting one double switch at Baltimore. That one shortly after altered by Mr. Elgar. In 1830 altered from two moveable switches to one connecting rod, and fixed switch. Elgar's improved switch, one side the flange ran in a groove; the other on the flange, on the rail; flange ran on the outside the long side; fetches the car into the proper range.

I am acquainted with the curved ways. I saw one that had been laid to turn a short curve, before I left at Baltimore. First one I ever saw laid, in 1831, at Ellicott's Mills. Think the principle of turn-out is same principle, effect, mode of operation. Quarter a circle 60 feet curve.

And the said defendants, further to maintain the issue on their part, called as a witness

John H. B. Latrobe, sworn.

I reside in Baltimore; I have been the counsel of the Baltimore and Ohio Railroad company since 1827. I know Mr. Stimpson by sight and character. He granted to the Balt. and Ohio R. Rd. Co. the privilege of using the curved ways on their railroad, and all lateral roads connected therewith. I fix the date of the contract in the early part of October, 1834, because I have then a receipt of Mr. Stimpson's counsel for $2,500. Mr. Stimpson laid his claim against the Baltimore company for an infringement of his patent in 1832. It was referred to me by the company, and I advised them.

And the said counsel for the defendants did then and there offer to prove, by the said witness, the declarations of the plaintiff and his agent to the witness, that one settlement, made with the Baltimore and Ohio Railroad Company, with the plaintiff, was not an admission by the said company of plaintiff's right in the alleged invention, but a mere compromise of a pending suit, disconnected with a grant, in writing, made by the plaintiff to said company, and to that end, proposed to put the following questions, respectively, and in order, to the witness:

1. Do you know who was the agent or attorney of James Stimpson in negotiating the arrangement and settlement between him and the company referred to? Who was he?

2. State if any conversations occurred between James Stimpson or his agent, or counsel, at any time during the negotiations regarding the rights claimed by him in the patent for curved ways, without reference to the existence of a written contract, or its contents?

3. What were they?

And the said counsel for said plaintiff did then and there object that the said proof, so offered, was not good and lawful testimony to be received by the said judge, and heard by the said jury; and that the said questions should not be put to the said witness. And the counsel for the said defendants did then and there insist that the said proof, so offered, was good and lawful testimony, and that the said question should be put to the said witness. But the said judge did then and there deliver his opinion, and adjudge that the said proof was not good and lawful testimony by him to be received, and heard by the said jury; and that the said questions should not be put to the said witness. And thereupon, the counsel for the said defendants did then and there except to the last aforesaid opinion and udgm nt of the said judge, and inasmuch as the same, so excepted to,

does not appear on the record, the counsel for the defendants did then and there tender this bill of exceptions thereto, and requested the seal of the judge aforesaid should be put to the same according to law. And thereupon, the said judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions, according to law.

Robert B. Wright, sworn.

I am the son of James Wright, of Columbia—the same patentee of 1829. This is the model of an invention, for which my father obtained a patent, car and road. The manner in which it operates is when on a straight road. The *diameters are equal when in a curve—diameters* outside larger—a *larger* wheel outside—*smaller* in. The car phlange in Broad street runs on the outside. I would consider the principle the same and the effect the same.

In the original model one of the axles was fixed. In this it squares the wheel to the rail and the rail to the wheel.

Frederich Evelmaan.

I am county bridger and machinery engineer of Schuylkill Permanent Bridge. I am acquainted with the Elgar Switch—am acquainted with street curves form. In effect I consider them the same. In both instances the wheel on the outside runs on the flange—inside in a groove.

In the switch the outside flange is to compel the car to diverge from a straight line upon the curve, and the object and effect is the same. There are no differences in principle or substance in the two.

A series of these wards he proves being the same. If I had seen the curve for the *first time* without the car, I should not know its use.

And the counsel for the plaintiff, further to maintain the issue on his part offered to give in evidence on the said trial the deposition of Richard Caton, and to read the same as testimony in the said cause, (prout deposition.) And the counsel for the defendants did then and there object that so much of the testimony of the said Richard Caton in his said deposition as relates to the plaintiff's conversations with, and declarations to, the said deponent, (marked with red ink lines,) was not good and lawful testimony to be received by the said judge, and to be heard by the said jury, and insisted that the same should not be heard. But the said judge did then and there overrule the said objection, and did deliver his opinion, and adjudge that the said testimony should be received and read to the said jury. And thereupon the counsel for the said defendants did then and there except to the last aforesaid opinion and judgment of the said judge; and inasmuch as the same so excepted to does not appear on the record, the counsel for the defendants did then and there tender this bill of exceptions thereto, and requested the seal of the judge aforesaid should be put to the same according to law. And thereupon the said judge, at

the request of the said counsel for the defendants, did put his seal to this bill of exceptions according to law.

And the counsel for the plaintiff, further to maintain the issue on his part, offered to give in evidence on the said trial the deposition of George Nelson, and to read the same as testimony in the said cause, (prout deposition.) And the counsel for the defendants did and there object that so much of the testimony of the said George Nelson in his said deposition as relates to the plaintiff's conversations with, and declarations to, the said deponent, (marked with red ink lines,) was not good and lawful testimony to be received by the said judge, and to be heard by the said jury, and insisted that the same should not be heard. But the said judge did then and there overrule the said objection, and did deliver his opinion, and adjudged that the said testimony should be received and read to the said jury. And thereupon the counsel for the said defendants did then and there except to the last aforesaid opinion and judgment of the said judge; and inasmuch as the same so excepted to does not appear upon the record, the counsel for the defendants did then and there tender this bill of exceptions thereto, and requested the seal of the judge aforesaid should be put to the same according to law. And thereupon the said judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions according to law.

And the counsel for the plaintiff, further to maintain the issue on his part, offered to give in evidence on the said trial the deposition of Wm. A. Stimpson, and to read the same as testimony in the said cause, (prout deposition.) And the counsel for the defendants did then and there object that so much of the testimony of the said Wm. A. Stimpson in his said deposition as relates to the plaintiff's conversations with, and declarations to, the said deponent, (marked with red ink lines,) was not good and lawful testimony to be received by the said judge, and to be heard by the said jury, and insisted that the same should not be heard. But the said judge did then and there overrule the said objection, and did deliver his opinion, and adjudge that the said testimony should be received and read to the said jury. And thereupon the counsel for the defendants did then and there except to the last aforesaid opinion and judgment of the said judge; and inasmuch as the same so excepted to does not appear on the record, the counsel for the defendants did then and there tender this bill of exceptions thereto, and requested the seal of the judge aforesaid should be put to the same according to law. And thereupon, the said judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions according to law.

And the counsel for the plaintiff, further to maintain the issue on his part, offered to give in evidence, on the said trial, the deposition of Caleb Merritt, and to read the same as testimony in the said cause, (prout deposition). And the counsel for the defendants did then and there object that so much of the testimony of the said Caleb Merritt in his said deposition, as relates to the plaintiff's conversations with, and declarations to the said deponent (marked with red

ink lines) was not good and lawful testimony to be received by the said judge, and to be heard by the said jury, and insisted that the same should not be heard. But the said judge did then and there overrule the said objection, and did deliver his opinion and adjudge that the said testimony should be received and read to the said jury. And thereupon the counsel for the said defendants did then and there except to the last aforesaid opinion and judgment of the said judge, and inasmuch as the same, so excepted to, does not appear on the record, the counsel for the defendants did then and there tender this bill of exceptions thereto, and requested the seal of the judge aforesaid should be put to the same according to law. And thereupon, the said judge, at the request *at the request* of the said counsel for the defendant, did put his seal to this bill of exceptions, according to law.

James H. Stimpson sworn.

I am a son of the plaintiff. I am familiar with railroads and carriages. I have seen the short curves claimed by the plaintiff. This model is a representation of plaintiff's invention; flange on outside; tread on the *inner side.* I saw the model of October, 1830, sent to the B. and C. R. R. Co. It was taken from the railroad office, and (sometime) after broken to pieces, to make other models; wood being more seasoned. This the *healing* was before the settlement. I saw it when it was first broken. It was accidentally broken first. It was first broken by a fall; by letting it fall. It was ruptured in the middle. After that the remnants were used for the other model. This (2d) is the same as was in model original, except that it originally had another cart and trunk for passing water, and had no switch. It was larger. I assisted my father in measuring the streets of Baltimore. It was in the fall of 1829, and we wanted to find if the streets were wide enough to admit of curves of 60 feet radius. At this time I knew plaintiff's invention. He wanted to find if the streets were wide enough for a curve; and if so, if the flange on the wheel then in use was high enough to increase the diameter of the axle wheel so as to cause the car to go around, and the tread on the uneven. In December, 1829, plaintiff told me when we were coming in from Baltimore and Ohio railroad; he told me that they (the Baltimore and Ohio Railroad Co.) would want some curves to go into stores. He said the *turn-sheet* would not answer because of obstruction. I asked what would do. He told me one of the pieces, *tier* of a curve. I said I understood it. He said he could so fix a rail, that the *flange would take the outside.* I know the time, because it was between the time of our arrival and when the vessel arrived, dismasted. I have a draft of this thing. I first saw this draft in the month of December, 1829. It has been in the trunk ever since, of my father's; there is no date on it. I first saw it; for it was accrued directly after, and pursuant to the measuring the streets. Did not put it in a book. The draft was made to shew his principle, as he invented it. This is a plan of Wright and James's (3.)

I examined the length of Elgar's switch first put down. I do not know that the increase of the length of the tongue of the switch was before the date of my father's (1831) patent. This is reps. of Elgar's switch, as it was before 1830. Length 4 feet, no curve. Father made his own specifications and models. I espied them several times; then they were sent down to the office; six patents taken out at time alld.; they were delayed till the others were ready.

Special reason why taken out was, because they were no railroads brought into the city several times.

I am in my 22d year—I was 21, August, 1838. I was not going to school November, 1829; was then 11 years old. After I got to Baltimore I went to school—a year after I got there. In 1825 and 26 was a frame maker of looms. In New York he kept a store. A short time previously to leaving New York was sent to school. The first time I saw a railroad was one made in New York by him, to suit his horse car. It was in the yard of the shop. The first car he made was finished in New York. Saw no railroads on curves till Baltimore and Ohio R. Road. Never saw; cannot other than *conic sections.* The principle of curve can be carried out mechanically. I did not see the model broken. It was broken in the hands of the person who brought it from the office of the Baltimore and Ohio Railroad Company, at Fayette and Green. Gone after there. Suit brought B. and Ohio R. R. Company.

Broken up before 1831; end of.

My father and myself *made exact* of this inclined plane.

The wheels of cars, 3 feet are accommodated.

Here followed an examination *as to* Elgar's switch and the curve Comparison.

Of the 6 patents there are three.

1. Turnabout switch.
2. Internal flange.
3. This.

I copied the specification about this one. I have not one. He has not the original paper, of which I made a copy of this improvement. I do not know there is a copy in existence. The first Elgar switch was in 1830. The plan of qum. laid by Elgar. His plan on straight lines was *flange* to run on rail or grooves aced. bearing in Stricklands' plan. My father's is weight on plan.

Miles ex. I made a copy of my father's specification for this in 1836; afterwards copied by another person; copied by George Nelson. The copy made by Mr. Nelson was sent to the *Patent Office.* I do not know what became of original; might have been used for waste paper. I have not seen it since. The copy I made was copied by Mr. Nelson. I don't know where my copy is. I have not seen it since I left it in the hands of Mr. Nelson. Same gentleman as whose deposition is here. Since that time I have resided with my father. I spoke of a trunk out of which I got this drawing. I have examined the trunk for them, and they were not there. Plaintiff has not told me what has become of them. I did not ask him for them. I was overhauling the papers. I am *positive* there. At the time act. counsel

consd. important to keep them. The patent itself moled. By Congress it was considered important to keep them. I do not know whether my father considered it important. First time I got out in 1837 a 4 to suit Balt. and Ohio R. Road Co. Since that as to this case. Never had any motive. Patent trunk in 1836. Then after *cuy* I put the motion to enquire; I did act. I had so much knowledge of his papers, is the reason I did not ask him where it was.

There was a drawing accompanying the specification on which patent was obtained. We have no copy retained; one sent on.

There was a *model* sent to the Patent Office in 1831. The model contained several patents. There was no model. A copy kept and retained; too expensive. This was made within *two* months. This was made by M. S., in Baltimore—by myself. The switch was made by Mr. Wairt—made since cause pending.

This (black one) was made a year or two since. This (Wright, James & Stimpson,) before settlement with Baltimore and Ohio R. Road.

When I saw it, it was standing on and in the passage. I only saw it in the entry. Never saw any description.

I have had frequent conversations with my father on the subject. I have frequent converse about the suits; the earliest was Baltimore and Ohio; that was in 1832 and 1833. Since that time, he asked me to produce original drawing, and talked about dates; my business has been in charge of my father.

Some time previous to contract of Baltimore and Ohio Rl. Road suit; that was the first time father requested me to remember dates.

Don't remember he ever asked me to remember first conversation. It has never been asked me to recal to mind *when* and *what* took place first in 1829 between us; and paid the draft. This was suit in 1833, before Baltimore and Ohio R. Road.

Re-examined.—I am giving my own recollections.

Daniel Large sworn.

I am a steam engineer; I have seen the switches in use in Baltimore. Elgar's switch would not answer as well as a succession of switches—mud and ice and friction.

Can't tell what the value of a curved way is; depends on amount of business.

Examined.—Running on the flange 30 years ago, raised; must have been so; could not have been so without it. I have seen it in England; the *flange* rolling on the outside or raised part, and bearing in the end.

Explains the principle of the curve to be the same.

Thomas Davis sworn.

I have seen curved ways, spoken of by Stimpson; I have never seen any other mode, except revolving platform; I put one in in the

spring of 1834; purchased the right from Stimpson *after* it was laid down. *Before* I put it down, I wrote to know his terms. Good on day without his privilege. Some I know. I know Mr. Elgar. I had conversation with him. Mr. Elgar told me Mr. Stimpson *had no right to it.* I don't know who put it down. I don't know of Elgar's contr'y with other persons. I hear of two facts. Frontuno laid out mine. Jno. Malcolm is dead; he put it down in 1834. Stimpson did not put it down. Broad above Arch. Tried it for a passenger car. Paid him $40 for it. Mr. Stimpson *had* to be removed.

Receipt in writing.

And the counsel for the said defendants, further to maintain the issues on their part, called, as a witness,

Dr. Thomas P. Jones sworn.

Who testified, I am acquainted with the improvement of Mr. Stimpson in the method of turning short curves. I became acquainted with Stimpson's plans before his papers went into the Patent Office; afterwards, in the office, I examined it particularly, as I do all patents, for notice in my journal. I was not then officially connected with the Patent Office; had been previously Superintendant of the Patent Office. Since I have been officially connected as Examiner of Patents; resigned two months ago; am agent for patents. I am acquainted with the improvement claimed by Mr. Wright, of 1829—that which is in Journal of Franklin Institute, vol. 4, page 270; that the patent taken out by the pl'ff. in August, 1831, was surrendered at the Patent Office, and there burnt in Dec., 1836; that all the patents which had been there surrendered for renewal, were then destroyed, with their specifications.

The counsel for the defendant then put the following question to the witness: What were the contents of the specification objected to by the counsel for the pl'ff?

Mr. Miles, for the question, after reading the act of Congress of 3d July, 1832, § 3, said, that his object was to shew, whether pl'ff's patent of 1835 contained or described a different improvement from that of the patent of 1831; that if they were not the same, then the patent of 1835 was invalid.

Mr. Meredith, on the part of the pl'ff, and in support of the objection, said that they had no notice of any such evidence; that the examination of this witness had been long since closed; and his present examination, at this time, was irregular; that they had consented to it on the understanding and declaration of Mr. Miles, the deft's counsel; that the witness, Dr. Jones, was to be examined only as to his opinion and judgment in comparing the invention of the pl'ff with other inventions in use.

Mr. Miles insisted on the evidence, but was not explicit on the subject of the agreement under which the witness was allowed to be introduced and examined.

Mr. Ingersoll, for the pl'ff, insisted that it was agreed to examine Dr. Jones as to his opinion upon the models laid before him, and not

for any new facts, which should not now be admitted, after the pl'ff had discharged his witnesses on the declaration of the def't, that they had closed their evidence. [NOTE.—The pl'ff was proceeding with his rebutting testimony, when Dr. Jones was offered and admitted by consent.]

The Judge observed that this case strongly shews the danger of departing from the rules of evidence, on an understanding or agreement of parties, not reduced to writing, as they were very apt to have a different impression of it; that, if the agreement were as pl'ff understands it—that Dr. Jones was only to be examined as to his opinion, his judgment, his theories—then the present question is not in conformity with that agreement, but goes much beyond it. It is a question as to a matter of fact, not only important, but really vital to the plff's right, and not a mere opinion of the witness, on comparing the plff's invention with others.

Here Mr. Miles, on a conference with Mr. Meredith, agrees that the consent or agreement for the examination of Dr. Jones, was, that he was only to be examined as to his opinions or judgment of the plaintiff's invention.

The Court. Upon this ground the question is overruled, not being in conformity with the agreement. I do not find any note of exception to this opinion of the court, but Mr. Miles said he would withdraw the witness for the present, and bring him forward at another time, after the plaintiff has closed. It further appears by mynotes that after the plaintiff had closed his rebutting evidence, Thomas P. Jones was called again by the defendant to prove that the invention patented by plaintiff in 1835, was different from the invention patented in 1831; also he examined him as a man of science and learning, conversant with the subject, to explain wherein the patent taken out in 1835 differed from that of 1831, and upon the general scientific principles involved in the consideration of the subject before the court. This was objected to by the plaintiff.

1. Being incompetent, because parol.

2. It cannot be received at this stage of the cause. That defendant has given evidence on this point from Vol. 9, of Franklin Institute, which is written evidence, which defendant cannot now contradict by parol.

The court observed: Dr. Jones, the defendant says, is not called to contradict the published statement—may he not corrobarate it by parol?

Plaintiff then urged the objection as to the time of offering the evidence.

The court rejected the evidence, and thereupon the counsel for the said defendants did then and there except to that part of the opinion which denies that it is his right to put the question, and inasmuch as the same so excepted to does not appear on true record, the counsel for the defendants did then and there tender this bill of exceptions thereto, and requested the seal of the judge aforesaid should be put to the same according to law. And thereupon the said judge, at

the request of the said counsel for the defendants, did put his seal to this bill of exceptions, according to law.

JOS. HOPKINSON, [SEAL.]

UNITED STATES, EASTERN DISTRICT OF PENNSYLVANIA, *sct.*

I certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the Eastern District of Pennsylvania, in the third circuit, in a certain action on the case, therein lately depending between James Stimpson, plaintiff, and the Philadelphia and Trenton Railroad Company, defendants.

Witness my hand and the seal of said circuit court at Philadelphia, this tenth day of January, A. D. 1840, and in the sixty-
[L. S.] fourth year of the Independence of the said United States.

FRA. HOPKINSON, *Cl'k Circ't Ct.*

623.

SUPREME COURT OF THE UNITED STATES.

No. 55.

LESSEE OF HENRY BREWER, PLAINTIFF IN ERROR,

vs.

JACOB BLOUGHER AND DANIEL BLOUGHER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR MARYLAND.

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Langtree & O'Sullivan, Print.

THE UNITED STATES OF AMERICA,
District of Maryland, to wit.

At a Circuit Court of the United States for the fourth circuit, in and for the Maryland district, begun and held at the city of Baltimore, on the first Monday in April, in the year of our Lord one thousand eight hundred and thirty-eight.

Present the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States; Upton S. Heath, Judge of Maryland District; Nathaniel Williams, Esquire, Attorney; Nicholas Snider, Esquire, Marshal; Thomas Spicer, Clerk.

Among other, were the following proceedings, to wit:

JOHN DOE, Lessee of Henry Brewer,
vs.
JACOB BLOUGHER and DANIEL BLOUGHER.

Be it remembered, that heretofore, to wit, on the seventh day of October, in the year of our Lord one thousand eight hundred and thirty-four, John Doe, lessee of Henry Brewer, by B. S. Pigman and Charles F. Mayer, his attorneys, declared in the said circuit court here against Richard Roe in a plea of trespass in ejectment, with notice thereto annexed, in form following, to wit:

Declaration against casual Ejector.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

Richard Roe was attached to answer John Doe, of a plea, whereupon, he, the said Richard Roe, with force and arms, &c., entered into all that parcel of land called "*Part of Grassy Cabin,*" lying in Allegany county, in the State of Maryland, which is bounded and described as follows: Beginning for the same at a bounded white-oak tree, it being the beginning tree of the whole tract called "Grassy Cabin," and running thence with the outlines of the whole tract, the four following courses: south seventy-eight and a half degrees, east, one hundred and fifty-three perches; north, fifty degrees, east, forty-two perches; north, twenty-eight degrees, east, one hundred and sixty perches; north, fifty-nine and one-half degrees, west, one hundred and twenty-four perches, to the beginning of that part of "Grassy Cabin" conveyed by Frederick Blocher to Andrew Blocher, and reversing the given line thereof, south, seventy-two and one-fourth degrees, west, fifty-seven perches, to the end

of the twelfth and last line of Andrew Blocher's part of "Grassy Cabin," and reversing the lines of said part, south, seventy-nine degrees, west, fifty-one perches; north, eighty degrees, west, sixteen perches; north, forty-six degrees, west, thirty-four perches; south, sixty-seven degrees, west, thirteen perches; north, eighty-five degrees, west, fourteen perches; south, forty-nine degrees, west, thirty perches; south, sixty-eight degrees, west, thirty-eight perches, north, nine degrees, west, twenty-nine perches, to the south line of the whole tract called "Grassy Cabin," and running with the outlines of the whole tract, south, sixty degrees, west, twelve perches; south, forty degrees, west, one hundred perches, south, twenty-four degrees, west, seventy-six perches, then by a straight line to the beginning, with the appurtenances, situate and being in Allegany county, aforesaid, which Henry Brewer, a citizen of the State of Pennsylvania, had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe, then and there did, to the great damage of the said John Doe, and against the peace, government, and dignity of the State of Maryland, &c. And thereupon, the said John Doe, by B. S. Pigman and Charles F. Mayer, his attorneys, complains: That whereas, the said Henry, on the first day of July, in the year eighteen hundred and thirty-four, at the county aforesaid, had demised to the said John Doe the said tenements, with the appurtenances, to have and to hold the same to the said John Doe, and his assigns, from the thirtieth day of April, in the year aforesaid, for and during, and unto the full end and term of seventy years, from thence next ensuing, and fully to be complete and ended. By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became, and was possessed thereof for the said term, so to him thereof granted as aforesaid. And the said John Doe being so thereof possessed, the said Richard Roe, afterwards, to wit, on the first day of June, in the year aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm; and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace, government, and dignity of the State of Maryland; wherefore, the said John Doe saith that he is injured, and hath sustained damage to the value of one thousand dollars, and therefore he brings his suit, &c.

B. S. PIGMAN,
CHARLES F. MAYER,
Attorneys for Plaintiff.

Notice.

Messrs. Jacob Blougher and Daniel Blougher, citizens of the State of Maryland.

I am informed that you are in possession of or claim title to the premises in this declaration of ejectment mentioned, or to some part thereof, and

I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear on the first day of November next in the circuit court of the United States, for the fourth circuit, in and for the Maryland district, to be held at the Masonic Hall, in the city of Baltimore, by some attorney of that court, and then and there by rule of the same court, to cause yourselves to be made defendants in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this seventh day of October, in the year of our Lord eighteen hundred and thirty-four.

Your loving friend,

RICHARD ROE.

Copies of which said declaration and notice were made and sent to the marshal for the Maryland district aforesaid, thereon endorsed, "Copies to be served on the tenants in possession, or to be set up on the premises, if no tenants," &c.

At which said first day of November, in the year of our Lord one thousand eight hundred and thirty-four, and being the day of the return of the service of the aforegoing declaration in ejectment, comes into the circuit court here the said John Doe, lessee of the said Henry Brewer, and the marshal of the Maryland district aforesaid, to wit, Thomas Finley, gentleman, to whom copies of the said declaration and notice in ejectment were, in form aforesaid, made and sent, certifies the service thereof to the court here, in form following, to wit:

Return of Service.

"Copy served on Jacob Blougher and Daniel Blougher, landlords in possession.

"THO. FINLEY,
Marshal."

Whereupon, the said John Doe, lessee of the said Henry Brewer, by his attorneys aforesaid, prays that the said Jacob Blougher and Daniel Blougher, to his declaration aforesaid, may appear and answer, or in default thereof, judgment be rendered against the said Richard Roe, the casual ejector. Whereupon the said Jacob Blougher and Daniel Blougher, by John Glenn and William Price, their attorneys, appear in the circuit court here, and pray leave of the court, as landlords of the premises, to be made defendants in the plea of the said Richard Roe, the casual ejector; whereupon it is ruled by the court here, with the consent of the said John Doe, lessee of the said Henry Brewer, by his attorneys aforesaid, and the said Jacob Blougher and Daniel Blougher, who claim the title in question, by their attorneys aforesaid, that the said Jacob Blougher and Daniel Blougher be admitted defendants in the place of the then defendant Richard Roe, the casual ejector, and that they immediately receive

a declaration, and plead thereto the general issue, and at the trial thereon to be had, the said Jacob Blougher and Daniel Blougher should appear in their proper person, or by their attorney or counsel, and confess lease, entry, and actual ouster and expulsion of so much of the premises in the said declaration of the said John Doe, lessee as aforesaid, as is in the possession of the said Jacob Blougher and Daniel Blougher, or any other person, claiming by or under their title, or in default thereof, judgment be entered against the then defendant, Richard Roe, the casual ejector, but that prosecution be stayed against him until he should make default in any of the premises.

And it was further ruled by the court here, with consent of counsel, that if, by reason of such default, the said John Doe, lessee, as aforesaid, should become non suit at the trial, the said Jacob Blougher and Daniel Blougher should take no advantage thereof, but should pay the said John Doe, lessee as aforesaid, his costs, &c.

And it was further ruled by the court here, that if upon the trial of the issue, a verdict should be given for the said Jacob Blougher and Daniel Blougher, or the said John Doe, lessee, as aforesaid, should prosecute his declaration for any other cause than for not confessing lease, entry, and ouster, as aforesaid, the said Henry Brewer, lessor of the said John Doe, should pay the costs, &c.

And thereupon, the said John Doe, lessee as aforesaid, declares against the said Jacob Blougher and Daniel Blougher, in the plea aforesaid, in manner and form following, to wit:

Declaration against Real Defendants.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

Jacob Blougher and Daniel Blougher were attached to answer John Doe of a plea, whereupon they, the said Jacob Blougher and Daniel Blougher, with force and arms, &c., entered into all that parcel of land called "*Part of Grassy Cabin*," lying in Allegany county, in the State of Maryland, which is bounded and described as follows: Beginning for the same at a bounded white-oak tree, it being the beginning tree of the whole tract called "*Grassy Cabin*," and running thence with the outlines of the whole tract, the four following courses: south, seventy-eight and one-half degrees, east, one hundred and fifty-three perches; north, fifty degrees, east, forty-two perches; north, twenty eight degrees, east, one hundred and sixty perches; north, fifty-nine and one-half degrees, west, one hundred and twenty-four perches, to the beginning of that part of "Grassy Cabin" conveyed by Frederick Blocher to Andrew Blocher, and reversing the given line thereof, south, seventy-two and one-fourth degrees, west, fifty-seven perches, to the end of the twelfth and last line of Andrew Blocher's part of "Grassy Cabin," and reversing the lines of said part, south, seventy-nine degrees, west, fifty-one perches; north, eighty degrees, west, sixteen perches; north, forty-six degrees, west,

thirty-four perches; south, sixty-seven degrees, west, thirteen perches; north, eighty-five degrees, west, fourteen perches; south, forty-nine degrees, west, thirty perches; south, sixty-eight degrees, west, thirty-eight perches; north, nine degrees, west twenty-nine perches; to the south line of the whole tract called "Grassy Cabin," and running with the outlines of the whole tract, south, sixty degrees, west, twelve perches; south, forty degrees, west, one hundred perches; south, twenty-four degrees, west, seventy-six perches; then by a straight line to the beginning, with the appurtenances, situate and being in Allegany county aforesaid, which Henry Brewer, a citizen of the State of Pennsylvania, had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe, then and there did, to the great damage of the said John Doe, and against the peace, government, and dignity of the State of Maryland, &c.

And thereupon, the said John Doe, by B. S. Pigman and Charles F. Mayer, his attorneys, complains: That whereas, the said Henry on the first day of July, in the year eighteen hundred and thirty-four, at the county aforesaid, had demised to the said John Doe, the said tenements, with the appurtenances, to have and to hold the same to the said John Doe, and his assigns, from the thirtieth day of April, in the year aforesaid, for and during, and unto the full end and term of seventy years, from thence next ensuing, and fully to be complete and ended. By virtue of which said demise the said John Doe entered into the said tenements, with the appurtenances, and became and was possessed thereof, for the said term, so to him thereof granted as aforesaid. And the said John Doe being so thereof possessed, the said Jacob Blougher and Daniel Blougher, afterwards, to wit, on the first day of June, in the year aforesaid, with force and arms, &c., entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm; and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace, government, and dignity of the State of Maryland; wherefore the said John Doe saith that he is injured, and hath sustained damages to the value of one thousand dollars, and therefore he brings his suit, &c.

B. S. PIGMAN,
CHARLES F. MAYER,
Attorneys for Plaintiff.

Whereupon, the said John Doe, lessee as aforesaid, by his attorneys aforesaid, prays that the said Jacob Blougher and Daniel Blougher to his declaration aforesaid, may answer.

Thereupon, on motion of the said Jacob Blougher and Daniel Blougher, by their attorneys aforesaid, leave is given by the court here to the said Jacob Blougher aud Daniel Blougher to ascertain their defence, and to answer to the declaration aforesaid, of the said John Doe, lessee as aforesaid, in the plea aforesaid, until the eighth day of April next; the same day is given to the said John Doe, &c.

At which said eighth day of April, in the year of our Lord one

thousand eight hundred and thirty-five, till which said day the said Jacob Blougher and Daniel Blougher had leave to ascertain their defence, and answer to the declaration aforesaid, of the said John Doe, lessee as aforesaid, in the plea aforesaid, come again into the circuit court here, as well the said John Doe, lessee as aforesaid, by his attorneys aforesaid, as the said Jacob Blougher and Daniel Blougher, by their attorneys aforesaid.

Plea and Issue.

And the said Jacob Blougher and Daniel Blougher, by their attorneys aforesaid, defend the force and injury when and so forth, and say that they are not guilty of the trespass and ejectment aforesaid, in the declaration aforesaid mentioned, in manner and form as the said John Doe, lessee as aforesaid, above complains against them, and of this they put themselves upon the country; and the said John Doe, lessee as aforesaid, by his attorneys aforesaid, in like manner, and so forth.

Thereupon, further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first day of November next.

At which said first day of November, in the year of our Lord one thousand eight hundred and thirty-five, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the eighth day of April next.

At which said eighth day of April, in the year of our Lord one thousand eight hundred and thirty-six, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first day of November next.

At which said first day of November, in the year of our Lord one thousand eight hundred and thirty-six, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the eighth day of April next.

At which said eighth day of April, in the year of our Lord one thousand eight hundred and thirty-seven, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Thereupon further process of and upon the premises aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first day of November next.

At which said first day of November, in the year of our Lord one

thousand eight hundred and thirty-seven, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

Thereupon farther process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is further continued until the first Monday in April next.

At which said first Monday in April, in the year of our Lord one thousand eight hundred and thirty-eight, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

And the parties aforesaid, by their attorneys aforesaid, file in the circuit court here an agreement in the words following, to wit:

Agreement.

BREWER'S Lessee *vs.* BLOUGHER and BLOUGHER.	Ejectment. In the circuit court of the U. States, for the fourth circuit in and for the district of Maryland.

It is agreed that any amendment or correction by way of interlineation or otherwise, may be made on part of the plaintiff in the pleadings as regards the averments of citizenships of the plaintiff or the plaintiff's lessor, or of the said Bloughers, or of the casual ejector; it being admitted that at the commencement of this action, the said lessor was, and that he yet is, a citizen of the State of Pennsylvania, and that the said Bloughers were then, and yet are citizens of Maryland.

It is agreed that such amendment or correction may be made before or after judgment on the case.

CHARLES F. MAYER,
Attorney for Plaintiff.
WM. PRICE,
Attorney for Defendants.

And thereupon the parties aforesaid, by their attorneys aforesaid, file in the circuit court here the following statement of facts:

Statement of facts.

HENRY BREWER'S Lessee *vs.* JACOB BLOCHER and DANIEL BLOCHER.	Ejectment. In the circuit court of the United States, for the fourth circuit and district of Maryland.

In this case the parties agree the following to be the facts upon which the question of title depends.

John Sloan, late of Allegany county, was twice married; by his first wife he had but one child, namely, Mary Sloan, and by his second wife he had the following children, namely, William Sloan, John Sloan, Elizabeth Sloan, Peggy Sloan, Sally Sloan, and Jane Sloan; and that the plaintiff's lessor is the husband of the said Elizabeth.

After the death of his second wife, the said John Sloan lived and cohabited with and married Mary Sloan, his said daughter, by his first wife,

and had by her the following children, viz.: William Sloan, John Joseph Sloan, Mary Sloan, Jesse Sloan, and David Sloan; and that William Sloan is since dead.

The said John Sloan, the father, was many years ago seized and possessed of a tract of land lying in Allegany county, Maryland, called "Grassy Cabin," containing 427¼ acres, to which tract he had an undisputed legal title.

The said John Sloan, being so seized and possessed of the said tract of land, conveyed the same for valuable consideration, by a deed of bargain aad sale duly executed, acknowledged, and recorded according to law, to the said John Joseph Sloan, and that the said John Joseph Sloan became and was seized and possessed of the said tract of land, under and by virtue of the said deed.

The said John Sloan, the father, and Mary Sloan, his said daughter, by his first wife, both departed this life about the year 1826, and the said John Joseph Sloan died about the year 1832, seized and possessed of the said tract of land intestate, and without issue, and unmarried, leaving Mary Sloan, Jesse Sloan, and David Sloan, his brothers and sister, children of the said Mary Sloan, by her said father as aforesaid, him surviving.

That the said Mary Sloan, Jesse Sloan, and David Sloan, being possessed of and claiming title to the said tract of land, called "Grassy Cabin," by descent from the said John Joseph Sloan, conveyed the same, by a deed of bargain and sale duly executed, acknowledged, and recorded according to law, to Jacob Blocher and Daniel Blocher, the defendants.

After the death of the said John Joseph Sloan, the plaintiff, Henry Brewer, obtained out of the Western Shore land office, a special warrant of escheat, to re-survey and affect the said tract of land, called "Grassy Cabin," for an alleged want of the heirs of John Joseph Sloan, who died seized thereof, in fee, and intestate as aforesaid; and the patent was granted to the said Henry Brewer, which here follows, to wit:

Patent.

THE STATE OF MARYLAND, [SEAL.]

To all persons to whom these presents shall come, greeting:

JAMES THOMAS.
THEODORICK BLAND, Chl'r.

Know ye, that whereas, Henry Brewer, of Allegany county, on the fifteenth day of June, eighteen hundred and thirty-three, obtained out of the Western Shore land office, a special warrant of escheat to re-survey and affect a tract or parcel of land, called "Grassy Cabin," lying in the county aforesaid, originally, on the second day of August, seventeen hundred and sixty-eight, granted Captain Thomas Bassett for five hundred acres, for want of the heirs of John Joseph Sloan, who died seized thereof, in fee, and intestate. In pursuance whereof, a re-survey was made, and a

certificate thereof returned, when the same was found to contain the quantity of four hundred and twenty-seven and a quarter acres, and called "part of Grassy Cabin;" and he, the said Henry Brewer, having fully compounded for said land according to law, but a caveat being afterwards entered against the same, by William Sloan, and others, on a hearing whereof, before the honorable the chancellor, it was ordered that the said caveat be overruled. The State of Maryland doth hereby grant unto him, the said Henry Brewer, the said land called "part of Grassy Cabin," lying in Allegany county aforesaid. Beginning for the same, at a bounded white oak tree, it being the beginning tree of the whole tract called "Grassy Cabin," and running thence with the out lines of the whole tract the four following courses: south, seventy-eight and one half degrees east, one hundred and fifty-three perches; north, fifty degrees east, forty-two perches; north, twenty-eight degrees east, one hundred and sixty perches; north, fifty-nine and one half degrees west, one hundred and twenty-four perches; to the beginning of that part of "Grassy Cabin" conveyed by Frederick Blocher to Andrew Blocher, and reversing the given line thereof, south, seventy-two and one-fourth degrees west, fifty-seven perches, to the end of the twelfth and last line of Andrew Blocher's part of "Grassy Cabin;" and reversing the lines of said part, south, seventy-nine degrees west, fifty-one perches; north, eighty degrees west, sixteen perches; north, forty-six degrees west, thirty-four perches; south, sixty-seven degrees west, thirteen perches; north, eighty-five degrees west, fourteen perches; south, forty-nine degrees west, thirty perches; south, sixty-eight degrees west, thirty-eight perches; north, nine degrees west, twenty-nine perches, to the seventh line of the whole tract called "Grassy Cabin," and running with the outlines of the whole tract, south, sixty degrees west, twelve perches; south, forty degrees west, one hundred perches; south, twenty-four degrees west, seventy-six perches; then by a straight line to the beginning; containing four hundred and twenty-seven acres and one-fourth of an acre, according to the certificate of resurvey thereof, taken and returned into the Western Shore land office, bearing date the fifth day of September, eighteen hundred and thirty-three, and there remaining, together, with all rights, profits, benefits, and privileges, thereunto belonging. To have and to hold the same unto him, the said Henry Brewer, his heirs and assigns, forever.

Given under the great seal of the State of Maryland, this third day of June, eighteen hundred and thirty-four.

Witness the honorable Theodorick Bland, Esquire, chancellor.

Endorsed—Examined with certificate.

Allegany County.

Mr. Henry Brewer, his patent for 427¼ acres, "part of Grassy Cabin." Recorded in Liber G. G. B., No. 1, folio 541, and examined.

pr. GEORGE G. BREWER,
Reg. L. O. W. S. Md.

The question for the decision of the court, upon these facts is, whether upon the death of the said John Joseph Sloan, according to the laws and

statutes of Maryland, the said tract of land called "Grassy Cabin," did not pass by descent to the said Mary Sloan, Jesse Sloan, and David Sloan, his illegitimate sister and brothers as aforesaid. If the court shall be of opinion that the said tract of land did not so pass by descent, then judgment to be given with costs for the plaintiff. If the court shall be of opinion that the said tract of land did so pass by descent, then judgment be given with costs, for the defendants. Either party to be at liberty to appeal or to sue out a writ of error, it being admitted that the value of the land in controversy is at least twenty-five hundred dollars.

B. S. PIGMAN, CHARLES F. MAYER,
Atty's for Pltffs.
WM. PRICE, Atty. for Defts.

Judgment.

Whereupon the premises being seen and fully understood by the court here, and mature deliberation thereupon had, for that it appears to the court here that the said Jacob Blougher and Daniel Blougher is nothing guilty of the trespass and ejectment aforesaid, as the said Jacob Blougher and Daniel Blougher above, in pleading for themselves, have alleged: Therefore, it is considered by the court here, that the said John Doe, lessee as aforesaid, take nothing by his declaration aforesaid, but be in mercy for his false clamour thereupon: and that the said Jacob Blougher and Daniel Blougher go thereof without day, &c.

And it is further considered by the court here, that the said Jacob Blougher and Daniel Blougher recover against the said John Doe, lessee as aforesaid, the sum of by the court here on their assent adjudged to the said Jacob Blougher and Daniel Blougher, for their costs and charges by them about their defence in this behalf laid out and expended, and that they have thereof their execution, &c.

Afterwards, to wit, on the twenty-sixth day of May, in the year of our Lord eighteen hundred and thirty-eight, the aforesaid John Doe, lessee as aforesaid, by his attorneys aforesaid, produced to the said circuit court here the writ of the said United States of America, for the correcting of errors, of and upon the premises, commanding the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in August next, which said writ of error is in the words and of the tenor following, to wit:

Writ of Error.

UNITED STATES OF AMERICA, ss.

The President of the United States to the Judges of the circuit court of the United States for the district of Maryland, greeting:

[SEAL.] Because in the record and proceedings, and also in the rendition of the judgment of a plea of trespass and ejectment which is in the said circuit court, before you or some of you, between John Doe, lessee of Henry Brewer, plaintiff, and Jacob Blougher

and Daniel Blougher, defendants, a manifest error hath happened, to the great damage of the said John Doe, lessee as aforesaid, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Do command you, if judgment be therein given, that, then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of August next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of our Supreme Court, the second Monday in January, in the year of our Lord one thousand eight hundred and thirty-eight.

THO. SPICER,
Clk. Circuit Court.

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

Citation.

THE UNITED STATES OF AMERICA,

To Jacob Blougher and Daniel Blougher, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States, to be held at the city of Washington on the second Monday in January instant, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit, in and for the Maryland district, you are defendants, and Henry Brewer's lessee is plaintiff, to shew cause, if any there be, why the judgment rendered against the said Henry Brewer's lessee in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand and seal this thirteenth day of January, 1839.

R. B. TANEY, [SEAL.]

Service of this citation acknowledged. J. GLENN.

Writ of Error Bond.

Know all men by these presents, that we, Henry Brewer and Peter Beachy, are held and firmly bound unto Jacob Blougher and Daniel

Blougher, in the sum of five hundred dollars, to be paid to the said Jacob and Daniel, their executors, administrators, and assigns, to which payment well and truly to be made, we hereby bind ourselves, jointly and severally, our respective heirs, executors, and administrators, firmly by these presents; sealed with our seals, and dated this 5th day of January, in the year eighteen hundred and thirty-nine.

Whereas, in an action of ejectment, pending in the circuit court of the United States for the fourth circuit in and for the Maryland district, between the lessee of said Brewer, plaintiff, and said Jacob and Daniel, defendants, judgment was by said court at its April term of the year eighteen hundred and thirty-eight rendered for the said defendants; from which judgment the said Brewer's lessee is about to sue forth a writ of error to the Supreme Court of the United States. Now, the condition of the above obligation is such, that if the said lessee shall prosecute said writ of error with effect, and shall also satisfy and pay to the said Jacob and Daniel, their executors, and administrators, and assigns, in case said judgment shall be affirmed, as well as all and singular the costs and charges adjudged by the circuit court aforesaid, as also all costs and charges and damages that shall be awarded by the said Supreme Court, then the above obligation shall be void, but else, be and remain in full force and virtue.

his
HENRY ⋈ BREWER, [SEAL.]
mark.
PETER BEACHY. [SEAL.]

Sealed and delivered in presence of
H. B. PIGMAN.

Approved: R. B. TANEY.

In testimony that the aforegoing is a true copy taken from the record and proceedings of the circuit court aforesaid, I hereunto [SEAL.] subscribe my name, and affix the seal of said circuit court, this eleventh day of January, in the year of our Lord one thousand eight hundred and forty.

THO. SPICER, Clk. Cir. Ct.

630.

SUPREME COURT OF THE UNITED STATES.

No. 56.

LESSEE OF HENRY E. SLOAT, PLAINTIFF,

vs.

JOHN HAUGHWOUT, ET AL.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT UNITED STATES, NEW YORK.

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Langtree & O'Sullivan, Print.

UNITED STATES CIRCUIT COURT
For the Southern District of New York.

JAMES JACKSON, ex dem.
Henry E. Sloat,
vs.
JOHN HAUGHWOUT, et al.

This was an action of ejectment brought to recover a piece of land with the tenements and buildings thereon situate, in the county of Richmond, and being upon the north shore of the Staten island, adjoining the river called Kill Van Kull, represented by being colored pink upon the map hereto annexed; and was brought on to trial before the Hon. Smith Thompson, circuit judge, and the Hon. Samuel R. Betts, district judge of the said court, and a jury on the 25th day of November, 1837, and continued on trial until the 2d day of December, 1837.

The plaintiff claimed the premises represented upon the annexed map and shaded pink color, as being a part of the Corson farm so called, of which farm Cornelia, the daughter and heir of Jacob Corson, and wife of Gozen Ryers, died seized, and under whom the lessor of the plaintiff claimed the Corson farm by a paper title derived from her heirs; that as late as the year 1790, the premises were a mud flat, partly covered with water by high tides, and that an old road run where the academy now stands.

That about 1790 a bulkhead was made across the front of the flat next to the Kill, and it was filled in so as to make a dock for landing, varying from three to five or six feet high; the flat was not enclosed by a fence; no buildings were erected upon it till after 1827; the academy was built in about 1810, and a fence put around it; the old road having been taken up and a new one made, represented upon the map.

The mud flat, colored pink, upon the map was claimed by the plaintiff as a part of, and included in, the Corson farm: alleging that the Corson farm lay adjoining to and upon the north-west side of the Richmond road, and extending to and fronting upon the Kill Van Kull, and that the McDonald farm adjoining the Richmond road upon the southeasterly side and extended to the Kill Van Kull, the farms being divided by the road.

The plaintiff also claimed that Jacob Corson, who died before the revolutionary war, lived upon and claimed to be the owner of the Corson farm, which was supposed to be bounded southeasterly by the Richmond road, and northerly by the Kill Van Kull, and that he left, as heirs at law, three daughters; Cornelia, married to Mr Linder, who died, and she was afterwards married to a Mr. Duffie, who died; and about 1784 she was married to Gozen Ryers.

Elizabeth married to Sebring, and Maria married to Simonson; the part of the farm adjoining the Richmond road and Kill Van Kull, fell to the

share of Cornelia, who lived with her several husbands upon the farm in the mansion house, which is near the premises in question, and is marked "Sloat's house" on the map.

Cornelia, the wife of Gozen Ryers, died in 1795, without issue, her husband Ryers surviving, and he died in 1802.

Mrs. Simonson died, leaving two children her heirs at law, John Simonson, and Cornelia, married to a Corson; Mrs. Sebring died in 1826.

In 1788 Ryers and wife joined in a conveyance to Terrence Reilly of the right *and right* and interest of Mrs. Ryers in the Corson farm, but which conveyance was not acknowledged by Mrs. Ryers in a manner to to pass real estate; Reilly immediately conveyed to Ryers.

From the period of this conveyance the plaintiff claimed that Ryers held the Corson farm as (and including the premises in question) under the conveyance from his wife, and that he made the bulk head and filled up the flat to use as a dock, and kept it as a landing place, contributing to the custom and increasing the value of the tavern stand, kept in the house now called the "Sloat house;" and that he made the new road across the premises.

The plaintiff gave in evidence the deed to the lessor of the plaintiff marked A.

The plaintiff also gave in evidence the deed from John Simonson to to Van Pelt and Mersereau, marked B. The plaintiff produced the master's report of title in the proceedings in partition, and the boundaries were in conformity with the boundaries in the deeds, marked A and B, and also the commissioner's report in partition describing like boundaries, and the plaintiff proved that these boundaries were taken from a survey made in 1805 for Capt. Carnes.

The plaintiff produced the will of Gozen Ryers, dated October 1, 1800, marked C: also, the mortgage by Gozen Ryers to the loan office, dated September 25, 1792, with the endorsements thereon marked D: also the mortgage from Gozen Ryers to Richard Waln, dated 5th June, 1800, marked E: also the mortgage from John P. Ryers to Richard Waln, dated 1st July, 1802, marked F: also the deed upon the foreclosure of these mortgages to Alexander Cairnes, dated 7th August, 1805, marked G.

The plaintiff also proved that suits in ejectment were brought by Mrs. Sebring and others, the heirs at law of Mrs. Ryers, and recoveries had against Cairnes and his tenants upon the ground that the estate of Mrs. Ryers did not pass, there being no legal acknowledgment of the deed to Reilly under which they claimed; and that possession of the Corson farm was taken under those recoveries.

The plaintiff also proved that the sales under the decree for partition were open, public sales, made at the Sloat house. The plaintiff also produced in evidence a deed from Henry Kruzer to his daughter, Cornelia, dated 13th March, 1742, marked H, annexed, and proved that the grantee was marked to Jacob Corson, senr. The plaintiff also introduced in evidence a deed from Alexander McDonald to Gozen Ryers, dated 17th July, 1786, for the McDonald farm, boundaries as in schedule I. annexed.

The defendants claimed title to the premises in question, in this suit, to wit: the mud-flat colored pink on the annexed map, under title derived

from Doick Hoaglandt, annexed, marked No. 2, whom the defendants alleged was the heir at law of Johannes Hoaglandt, and the original owner of the Corson farm and of the premises in question. The defendants produced in evidence the license of Gouverneur Hunter to erect a church dated in 1714, annexed, marked No. 1.

Also, a conveyance by Doick Hoaglandt to Veghte and others, trustees of the Reformed Dutch Church, dated in 1720, annexed, marked No. 2, as aforesaid: also the record of a highway laid out by the commissioners of highways, dated in 1774, annexed, marked No. 3: also a certificate or charter of incorporation of the Reformed Dutch Church of Staten island, under the statute of the State of New York hereto annexed, marked No. 4: also a deed from the Reformed Dutch Church of Staten island, to Matthias Haughwout and Jacob Haughwout for the premises in question in this suit, hereto annexed, marked No. 5; and the defendants also gave evidence that they erected a blacksmith's shop as early as May, 1827; and they erected a stone wall of two feet high on the northwesterly side of the premises in question in May or June of 1828.

The defendants also proved by witnesses that the fence of the Corson property, 54 or 55 years ago, commenced at the river called Kill Van Kull on the west side of Sloat's dock, and run from thence to the northeast corner of the Corson mansion house, designated as "Sloat's house" on the map, and from the house in a direct line to the Elizabethtown or old point road, and from the other side of the road to the church land, and that the fence has continued in the same place ever since; that the said premises had always remained open and unenclosed till the church sold it to M. & J. Haughwout in 1827, and that previous to that time the premises in dispute had been used by the public as a common.

The plaintiff also proved by witnesses that about 1790, Gozen Ryers, with his own workmen and teams, and by the assistance of the neighbours at his request, had filled up a mud flat and built a bulkhead in front of it, which was used by him; he claimed the same as owner, and charged dockage, and in one instance it was paid to him: And the defendants proved by witnesses that the same was filled up for the use of the public, and that Ryers as late as 1800 disclaimed any right to said premises, and said that said premises belonged to the church or to the public.

A.

This indenture, made the twentieth day of November, in the year of our Lord one thousand eight hundred and twenty-eight, between Thomas Lawrence, Jacob Crocheron and Richard Connor, all of Richmond county, in the State of New York, of the first part, and Henry E. Sloat of the said county of Richmond, inn-keeper, of the second part, whereas, Elizabeth Sebring, widow of Jacob Sebring, some time since of the city of New York, deceased, on or about the eleventh day of August, in the year of our Lord eighteen hundred and twenty-three, exhibited her bill of complaint, in the court of equity, for the first circuit of the State of New York, against Cornelia Corson, John Simonson and Nancy his wife, David Merrereau and Maria his wife, and Joshua Merrereau and Deborah his wife, setting forth among other things that the said Elizabeth Sebring was

seized in fee in her own right as tenant in common with others in the said bill named, of two equal undivided fourth parts (the whole into four equal parts to be divided) of all and singular those certain lots of ground and premises, situated, lying and being on Staten Island, in the town of Northfield, in the county of Richmond; the first whereof is bounded and described as follows, to wit: Beginning at the dock by a brook or run of water where it empties into the kills, adjoining Merrereau's ferry, running from thence up said run of water south forty-three degrees, west two chains and eighty-nine links to the public road, leading to the old point road; thence crossing said road south fifty-two degrees, thirty minutes west three chains and sixteen links to and along church lands; thence along said church land thirty degrees and thirty minutes, west one chain and eighty links to the south-west corner of church land; thence along the same, south fifty-five degrees forty minutes, east one chain and eight links to the public road leading to Richmond; thence along said road, south, thirty-five degrees, thirty minutes, west, fourteen chains and ninety links to the corner of the lands of John Nichols; thence leaving said road and running by the lands of said John Nichols, north eighty-three degrees, west fifteen chains and five links; thence north eighty-four degrees, thirty minutes, west seven chains and ten links to the corner of the fence, adjoining the lands of John Van Pelt; thence with said Van Pelt's lands north twenty degrees, east four chains; thence north, twenty-two degrees thirty minutes, east nine chains and eight links; thence north twenty-eight degrees, thirty minutes, west fifty-two links, to the public highway, leading from Merrereau's ferry to the ferry opposite to Elizabethtown point; thence crossing said road and running north thirty-four degrees, west two chains and ninety-three links to the cove and kill first above mentioned; thence easterly by the said kill with the shore thereof, several courses and distances to the place of beginning, including the dock within said bounds, and the water privileges appertaining to the said lot of ground, and containing within said bounds forty-three acres and three-tenths of an acre by actual survey. The second piece of ground was formerly in the possession of Margaret Murray, and is bounded as follows: Beginning at the northwesterly corner of hereinafter to be described, at the junction of the public road leading from the town of Richmond to Merrereau's ferry, and the road leading to the manor of Cartleton; thence south seventy-five degrees, east twenty-two chains and thirty-five links along the last mentioned road to the land in the possession of John Blake, south twelve degrees, west one chain and sixty-four links; thence along the land of John Tyson, north seventy-five degrees, west nine chains and fifteen links; thence along the land of the said John Tyson, south ten degrees, west twenty-one chains and twenty-five links to the woodland of Abraham Simerson, north seventy-five degrees and thirteen chains and fifty links to the first mentioned road; thence along said road north ten degrees, east twenty-one chains and forty-seven links to the place of beginning, containing thirty acres. The third piece of ground is described as follows, to wit: All that lot, piece or parcel of salt meadow ground situate in the town of Northfield aforesaid, and lying and being on the sound opposite the red barn which lately stood near Elizabethtown point, and bounded as follows, to wit: Westerly and southerly, partly by the sound, and on

the south by the Glebe lands, Tum's creek and the salt meadow lands of the honorable Daniel D. Tompkins, and on the east by the lands of Daniel Simerson, containing forty acres, be the same more or less, as the same was formerly owned and possessed by Alexander Cairns, of Staten Island, deceased.

And that Cornelia Corson, of the city of New York, sometime since the wife of Daniel Corson, of Staten Island aforesaid, farmer, was seized in fee simple as tenant in common, in her own right, of one other fourth part of all and singular the aforesaid lots of ground and premises above described. And that John Simonson, of Northfield aforesaid, laborer, then was, or lately had been, seized in fee simple in his own right of the remaining one fourth part of all and singular the said lots of ground and premises above described; and further, therein setting forth that she the said Elizabeth Sebring was informed that the said John Simonson had sold and conveyed to David Mersereau, of Northfield, aforesaid, and Esquire, some portion of his interest in the said lands and tenements, or some part thereof. And that he had in like manner sold and conveyed to Joshua Mersereau, of Northfield aforesaid, mariner, an interest in some part of the aforesaid lands and tenements, but of what precise interest therein the said David Mersereau or the said Joshua Mersereau was seized, the said Elizabeth Sebring was ignorant. And that Nancy Simonson, the wife of the said John Simonson, was seized of an estate of dower initiate of, in and to all and singular the said lands and tenements whereof the said John Simonson remained seized, in fee as aforesaid. And that Maria, the wife of the said David Mersereau, was seized of an estate of dower initiate of, in and to all and singular the aforesaid lands and tenements whereof her said husband was seized in fee as aforesaid. And that Deborah, the wife of the said Joshua Mersereau, was seized of an estate and dower initiate of all and singular the said lands and tenements whereof the said Joshua Mersereau was seized in fee as aforesaid. Which said bill of complaint contained a prayer that the aforesaid lands and tenements might be divided, or partitioned, between the said tenants in common, according to their several and respective rights, titles, or interest therein, or that if partition thereof could not be made, as aforesaid, without prejudice to the interests of the said owners, that then the same might be sold by an order or decree of the said court. And, whereas, afterwards, to wit, on or about the twelfth day of August, in the year of our Lord one thousand eight hundred and twenty-three, the said Elizabeth Sebring did file her supplemental bill of complaint in the said cause, therein setting forth, among other things, that the said John Simonson had sold a portion of his estate in the aforesaid lands and tenements, or some part thereof, to the Reverend Peter J. Vanpelt, of Northfield, in the said county of Richmond, and that Martha, the wife of the said Peter J. Vanpelt, was seized of an estate of dower initiate of, in and to all and singular the said lands and tenements, whereof the said Peter J. Vanpelt was seized, as aforesaid; and further setting forth and shewing by way of amendment, that since the filing of the said original bill, the said Elizabeth Sebring, and the said Cornelia Corson, for a valuable consideration, executed and delivered to the said Joshua Mersereau a release or

quit claim of all their right, title, and interest, of, in and to all and singular the said lot of ground in the complainant's bill of complaint described as follows, to wit: all and singular that part of the lot first above described, and called the ferry, which is bounded as follows, to wit: all that certain lot of land situate, lying, and being in the town of Northfield, and county of Richmond, which is bounded as follows, to wit: beginning at the northeast corner of a lot containing forty-four acres in the said bill described by the public road leading to Elizabethtown point, and running along the same south fourteen degrees, west sixteen chains and sixty-six links, to the lands of John Nichols; thence, by said Nichols line, north eighty-four degrees and thirty minutes, west seven chains and ten links, to the lands of John Vanpelt; thence, by said Vanpelt's line, north twenty degrees, east four chains; thence, north twenty-two degrees and thirty minutes, east nine chains and eight links; thence, north twenty-five degrees and thirty minutes, west fifty-three links to the said road by the creek and bridge; thence, along said road seventy degrees, east seven chains and nineteen links, to the place of beginning, containing nine acres and three-tenths of an acre of land by actual survey. And that the said Joshua Mersereau was then seized, in severalty, of the last above described lot of ground and premises, and that neither the said Joshua Mersereau nor Deborah his wife, had any further in the said suit. And, whereas, such proceedings were afterwards had in the said suit, that at a court of equity held at the city hall of the city of New York, for the first circuit of the State of New York, on the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and twenty-three, a certain decretal order or decree was made in the said suit, whereby, amongst other things, the said Thomas Lawrence, Jacob Cocheron, and Richard Conner, (the parties of the first part to these presents,) were appointed commissioners to make partition of the lands and premises in the said order, particularly described among the parties therein mentioned, according to their respective rights and interests therein. And, whereas, such proceedings were thereupon afterwards had, that a court of equity held for the first circuit of the State of New York, at the city hall of the city of New York, on the sixteenth day of February, in the year of our Lord one thousand eight hundred and twenty-four, upon reading and filing a report of the said commissioners in the premises, a certain other decretal order or decree was made in the said suit, whereby it was ordered, adjudged, and decreed, that the said commissioners (the parties of the first part to these premises) should sell all and singular the said lands and tenements in the last aforesaid order mentioned at public auction, in such separate lots and parcels as they, the said commissioners, had in and by their aforesaid report for that purpose set forth. And that after such sale they should make report to the said court in the premises, as will more fully appear by reference to the last aforesaid decretal order, now remaining of record in the office of the clerk of the said circuit court of equity in the city of New York, reference being thereunto had. And, whereas, the said commissioners in pursuance of the authority and directions of the last aforesaid order or decree, after having given six weeks' previous notice of the time and place of such sale, in the manner directed

and required in and by the said last mentioned decretal order, did on the fifteenth day of April, in the year of our Lord one thousand eight hundred and twenty-four, offer for sale and sell at public auction, at the dwelling house, in the occupation of John Sebring, situated in the said town of Northfield, on a part of the said premises, all and singular the last above mentioned lands and tenements in twelve separate lots, as the same had been laid out by the said commissioners, and reported to the said court as aforesaid.

And whereas, upon such sale, Elizabeth Sebring, (the complainant in the said suit for petition above mentioned,) did become the purchaser of lot number one, of the before mentioned Ferry lot, bounded northerly by the Kill, southeasterly to and along Church lands by the road leading to Richmond, until it comes to the lands of John Nichols, southerly by the lands of said John Nichols, and westerly by lot No. two, containing six acres, and including the house, dock, and other improvements, for the sum of three thousand five hundred and twenty-five dollars, she being the highest bidder for the same. And the said Elizabeth Sebring did also become the purchaser of lot number three of said Ferry lot, containing fifteen acres, and bounded northerly by the Kill, easterly by lot number two, southerly by said John Nichols, and westerly by lot number four, for the sum of one thousand two hundred and twenty-five dollars, she being the highest bidder therefor. And whereas, the said commissioners, (the parties of the first part to these presents) having reported such sale to the said circuit court of equity, after having heard counsel thereon, did on the thirtieth day of October, one thousand eight hundred and twenty-four, make a further decretal order in the said premises, whereby, amongst other things it was decreed that the said report of sale of the said commissioners be in all things ratified and confirmed, and that the said sale be and the same thereby was approved of by the said court. And it was further ordered, adjudged, and decreed that the said commissioners, (the parties of the first part to these presents,) execute a good and sufficient conveyance in the law to the said Elizabeth Sebring, for the said lots of ground and premises, so sold to her as aforesaid, on receiving from her the consideration money of said sales; all which will fully and at large appear, by reference to the last aforesaid decretal order, now remaining of record in the office of the clerk of the said court of equity.

And whereas, the said Elizabeth Sebring, the complainant in the said suit, did appeal from the last aforesaid decree of the said circuit court of equity, to the court of chancery of the State of New York, which said court of equity finally affirmed the decree of the said court of equity; after which the said Elizabeth Sebring again appealed from the decree of the said court of chancery to the court for the trial of impeachment and correction of errors, in which said last mentioned court the decree of the said court of chancery was also affirmed, and the said cause was finally remitted to the said court of chancery, for the purpose of carrying into effect the orders and decrees aforesaid. And whereas previous to the final decision of the said cause in the said court of equity, the said Elizabeth Sebring departed this life intestate, and leaving amongst her heirs at law certain minors, who were incapable of taking the purchase of the said

lots of ground so made by the said Elizabeth Sebring, as aforesaid. And whereas, after the decease of the said Elizabeth Sebring, as aforesaid, the said cause was duly revived in the said court of chancery, and thereupon Cornelius Sebring, a son of the said Elizabeth Sebring, deceased, and Cornelia Sebring, Eliza Sebring, Edward Sebring, and William Sebring, infants, &c., and grand children of the said Elizabeth Sebring, deceased, being all the heirs at law of the said Elizabeth Sebring, were made complainants in the said suit; and thereupon, and on the petition of the complainants in said suit, and after due notice to all the defendants, the said court of chancery on the fifth day of April, in the year of our Lord one thousand eight hundred and twenty-eight, made a further order or decree in the said suit, whereby they directed the aforesaid commissioners, parties to these presents of the first part, to re-sell at public auction all and singular the aforesaid lots of grounds and premises, after giving such notice of the time and place of said sale as they were in and by the said last mentioned order or decree directed to give. And whereas the said commissioners, by virtue of the last aforesaid order or decree, after having given notice of the time and place of said sale as aforesaid, did on the thirtieth day of May, in the year of our Lord one thousand eight hundred and twenty-eight, sell on the premises, at public vendue, all and singular the said two lots of ground above particularly described, to Cornelius Sebring, of the city of New York, grocer, one of the complainants in the said suit, for the sum of five thousand six hundred and seventy dollars, that is to say, for the Ferry lot, so called, three thousand nine hundred and seventy-five dollars, and for the fifteen acre lot, (so called,) one thousand six hundred and ninety-five dollars; those being the highest bids offered for the said two lots of ground, respectively. And whereas the said commissioners, (the parties of the first part to these presents,) having made their report of such sales to the said court of chancery at the May term of the said court, held at the city hall of the city of New York, in the year last aforesaid, the said court did afterwards, to wit, on the seventh day of October, in the year of our Lord one thousand eight hundred and twenty-eight, make a further decretal order thereupon in the said suit; whereby, amongst other things, it was decreed that the said last mentioned report of the said commissioners be approved of by the said court, and that the same and every thing therein contained should be fully ratified and confirmed. And it was thereupon further ordered that the said commissioners should execute to the said Cornelius Sebring, the purchaser of the said lots of ground, a good and sufficient conveyance in the law for the said lots of ground, as by the last aforesaid decretal order now remaining of record in the office of the assistant register of the said court of chancery, in the city of New York, will fully and at large appear, reference being thereunto had. And whereas, afterwards, to wit, on the seventh day of October, in the year of our Lord one thousand eight hundred and twenty-eight, the said Cornelia Sebring and Henry E. Sloat, (the party of the second part to these presents,) having, by their contract presented to the said court of chancery, agreed that the said Henry E. Sloat should become the purchaser of the aforesaid ferry lot at the sum of three thousand nine hundred and seventy-five dollars, the same price

which the said Cornelius Sebring had agreed to pay for the same, and praying that the said Henry E. Sloat should become the purchaser of the said Ferry lot, in the place and stead of the said Cornelius Sebring, and that the said commissioner should execute a deed to the said Henry E. Sloat, for the said lot of ground and premises; and the same having been consented to by the parties in the said suit who were interested in the sale of the said lots, it was thereupon further ordered and decreed that the said Henry E. Sloat should become the purchaser of the said ferry lot, so called, and that the said commissioners should execute and deliver a good and sufficient conveyance in the law to him, for the same, on receiving from him the aforesaid sum of three thousand nine hundred and seventy-five dollars. Now therefore, this indenture witnesseth that the said parties of the first part, in pursuance of the authority and directions given to them in and by the last mentioned decretal order, and also, in consideration of the sum of three thousand nine hundred and seventy-five dollars, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second thereof and therefrom acquitted and discharged; have granted, bargained, sold, aliened, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all the aforesaid lot herein before mentioned and described as lot number one of the ferry lot, so called, and as having been sold to the party of the second part, and every part and parcel thereof, with the appurtenances. And also, all the estate, right, title, and interest which the said parties of the first part have or had, of, in, and to the said premises, herein before particularly described, described and intended to be conveyed with the hereditaments and appurtenances thereunto belonging, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; to have and to hold the said hereby granted premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, in as full and beneficial manner as the said parties of the first part ought, can, or lawfully may, grant and convey the same by these presents. In witness whereof, the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

THOMAS LAWRENCE, [L. S.]
JACOB CROCHERON, [L. S.]
RICHARD CONNER, [L. S.]

Sealed and delivered in the presence of
J. SMITH,
ABM. CROCHERON.

RICHMOND COUNTY, *to wit:*

On this 9th day of December, 1828, personally appeared before me, Thomas Lawrence, Jacob Crocheron, and Richard Conner, grantors within named, to me known, who severally acknowledged that they had executed the within indenture for the uses and purposes therein mentioned;

there being no erasures or interlineations therein, I do allow it to be recorded.

ABM. CROCHERON, Commr.

Recorded in Lib. R. of deeds, in pages from 291 to 300, the twelfth day of June, A. D. 1829.

WALTER BETTS, Clk.

B.

Recorded the following deed for Van Pelt and Mersereau the first day of July, 1824.

This indenture, made the fourth day of August, in the year of our Lord, 1823, between John Simonson, Jr., and Ann his wife, of the township of Northfield, in the county of Richmond, farmer, of the first part, and the Rev. Peter J. Van Pelt and David Mersereau, Esq., of the same place, of the second part, witnesseth that the said parties of the first part, for, and in consideration of the sum of one thousand four hundred dollars, lawful money of United States of America, to them in hand paid at or before the ensealing and delivery of these presents, by the said parties of the second part, the receipt whereof is hereby acknowledged; and the said parties of the second part, their heirs, executors and administrators, for ever released and discharged from the same by these presents, have granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents, do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said parties of the second part, and to their heirs and assigns forever, all the undivided fourth part, the whole into three parts to be divided, that certain lot, piece or parcel of land, situate and being in the township of Northfield, in the county of Richmond, at a certain place called Ryer's ferry, beginning at the dock, a brook or run of water, where it empties into the river called Kill Van Kull; running from thence up said run of water south 43 degrees, west 2 chains 89 links to the public road leading to the old point; thence crossing said road south 52½ degrees, west three chains 16 links to and along the Church land; thence along said Church land south 30½ degrees, west 1 chain 80 links, to south-west corner of church land; thence along the same, south 55 degrees and ⅔ of a degree, east one chain 8 links, to the public road leading to Richmond; thence along said road south 35½ degrees, west 14 chains and 90 links, to the corner of land of John Nichols; thence along said Nichols line north 83 degrees, west 15 chains 5 links, to the corner of land now or late in the possession of Joshua Mersereau; thence by said Mersereau's line north 14 degrees, east 16 chains 66 links, to the first mentioned road; thence crossing said road to a stake by a rock on the road, being the south-west corner of lot added to the lot called Dower Corson's lot; thence down said lot north 11 degrees, west 2 chains 88 links to the kills; thence along the kills north 59 degrees, east 2 chains 85 links; thence north 86 degrees, east 6 chains 10 links; thence north 82 degrees, east 4 chains; thence south 89 degrees, east 4 chains 69 links; thence south 72½ degrees,

east 3 chains 81 links; thence south 47 degrees, east 3 chains 13 links to the dock; thence north 50 degrees, east 2 chains 5 links to the end of the dock; thence south 44 degrees, east 2 chain 35 links to the beginning or outlet of the brook or run of water herein before mentioned, containing 44 acres, more or less, exclusive of the road, bounded northerly by the kills, easterly by the Church land and public road, southerly by land of John Nichols, and westerly by land now, or late, in the possession of Joshua Mersereau, and the lot added to the Dower Corson lot; also, all the undivided fourth part, the whole in 3 parts, to be divided of all that certain other lot, piece, or parcel of land, situate and being in the township and county aforesaid, and adjoining the lot herein before described, called the Dower Corson lot, beginning by bridge on the bank of the small creek butting therein, being the southwest corner of said lot, running down said creek, north 34 degrees, west 2 chains 93 links to cove and kills; thence north 52 degrees, east 3 chains 75 links to and along said cove and kills; thence north 80½ degrees, east 3 chains 27 links to ferry lot; thence along ferry lot south 11½ degrees, east 2 chains 88 links to a stake and rock to said land; thence along said road south 70 degrees, west 5 chains 63 links to the place of beginning, containing one acre and 4-10 of an acre, bounded southerly by the public road leading to the old point, westerly and northerly by the creek and kills, and by the ferry lot, now in the possession of John Sebing; also the fourth part of all that certain lot, piece or parcel of salt meadow, situate in the township and county aforesaid, adjoining Timison's creek, commencing at the Glebe meadow; thence running along the sound, and thence along said creek, containing thirty acres more or less, being all the meadow belonging to Cornelia Ryers, dec'd., on Staten Island. Also, the fourth part of one other lot of salt meadow situate in the State of New Jersey, containing about 30 acres, being point of the west meadow running along Newark Bay, also late the property of Cornelia Ryers. Together with all and singular the rights, members, privileges, hereditaments, and appurtenances, whatsoever, unto the said above mentioned and described premises, in any wise appertaining or belonging, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, dower, right of dower, property, possession, claim, and demand, whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances. To have and to hold the above granted, bargained, and described premises, and every part and parcel thereof, with the hereditaments and appurtenances, unto the said parties of the second part, their heirs and assigns, to their own proper use, benefit and behoof forever.

And the said John Simonson, Jr., for himself, his heirs, executors, and administrators, doth covenant, grant, and the said John Simonson, Jr., for himself, heirs, executors, and administrators, promise, and agree to, and with, the said parties of the second part, their heirs, and assigns, that he, the said John Simonson, at the time of the sealing and delivery of these presents, is lawfully seized of his own right, of a good, sure, absolute, and ndefeasible estate of inheritance, in fee simple, of, and in all and singu-

lar the above granted, bargained, and described premises, with the appurtenances, and has good right, full power, and lawful authority to grant, bargain, sell, and convey, the same in manner and form aforesaid; and that the said parties of the second part, their heirs, and assigns, shall and may at all times, peaceably and quietly, have, hold, use, occupy, possess and enjoy, the above granted premises, and every part and parcel thereof, with the hereditaments and appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said parties, of the first part, their heirs or assigns, or of any other person or persons, whomsoever. And that the same now are free, clear, discharged, and unencumbered of, and from all, former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind soever. And also, that the said parties of the first part, and their heirs, and all, and every other person, or persons whomsoever, lawfully or equitably, deriving any estate, right, title, or interest, of, in, or to the herein before granted premises, by, from under, or in trust for them, shall, and will at any time or times, hereafter, upon the reasonable request, and at the proper costs and charges in the law of the said parties, of the second part, their heirs, and assigns, make, do, and execute, cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, assurances in the law, for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said parties, of the second part, their heirs and assigns forever, as by the said parties of the second part, their heirs and assigns, or their counsel learned in the law, shall be reasonably devised, or required; and the said John Simonson, his heirs, the above described, and hereby granted, and released premises, and every part and parcel thereof, with the hereditaments and appurtenances unto the said parties of the second part, their heirs and assigns, against the said parties, of the first part, and their heirs, and against all and every person and persons, whomsoever, shall and will warrant, and by these presents forever defend.

In witness whereof, the parties to these presents have hereunto interchangeably set their hand and seals, the day and year first above mentioned.

JOHN SIMONSON, [L. S.]
ANN SIMONSON, [L. S.]

Sealed and delivered in the presence of
ABRAHAM CUCHERON,
JOSHUA MERSEREAU.

STATE OF NEW YORK, } *ss.*
Richmond County. }

On the seventh day of August, A. D. 1823, personally appeared before me, Abraham Cucheron, one of the commissioners of the said State, in and for said county, the within named John Simonson, and his wife Ann, known to me to be the persons named in, who duly acknowledged that they signed, sealed, and delivered the within instrument of writing, and executed the same, for the uses and purposes therein mentioned, and

the said Ann, being by me interrogated separate and apart from her husband, again acknowledged that she executed the same for the uses therein mentioned, of her own free will and accord, without any fear or compulsion of, or from her said husband; and I having examined the same, and finding no material erasures or interlineations, except such interlineations as are noted at the bottom of this instrument, do allow the same to be recorded.

ABM. CROCHERON,
Commissioner.

RICHMOND COUNTY, } ss.
Clerk's Office, }

I do hereby certify that the foregoing is a true copy of the original, as recorded in this office, the words the Dock interlined in this [SEAL.] copy. In testimony whereof, I have hereunto set my hand and affixed the seal of the said county, the twenty-fourth day of November, 1837.

WALTER BETTS, Clerk.

C.

I, Gozen Ryers, (of the county of Richmond and State of New York,) Esq., being of sound mind and memory, and being desirous to settle my worldly affairs whilst I have strength and capacity to do it, do make, ordain, and publish this my last will and testament, hereby revoking and making void all former wills heretofore made; and first and principally I commit my soul into the hands of my Creator who gave it, and my body to the earth, and to such worldly estate wherewith it hath pleased God to invest me, I dispose of the same as followeth: Imprimis, I give, devise, and bequeath to my son, John P. Ryers, the house in which I now live, and barn, together with all and singular, one moiety or equal half part of all the land situate, lying and being on the east side of the road leading from the ferry to Richmond town, and beginning at the southeast corner of my hay-house on the main road in front of my stone barn, and extending thence on a straight line to John Dunn's place, now occupied by Dr. J. Halrey, so as to make the tract of land, containing in all about twenty seven acres, to be in two equal parts, and bounded by the said road to Richmond, and on the east by the other moiety, and on the north in front by the Kills—for and during his natural life, and at his decease, to Gozen Adrian Ryers, (my grandson) his heirs and assigns forever.

Item. I give and bequeath to my son, John P. Ryers, all and singular, that tract of land which I got of my late wife, deceased, (except about thirty acres hereafter to be devised, and called the Wood-pasture) situate, lying and being on the main side of the main road, leading from my ferry (viz: Gozen Ryers' ferry) to Richmond, and bounded on the east by said road; on the south by Mrs. Garretson's land; on the west by land occupied by the widow Van Pelt; and on the north by the river called Kill Van Kull, and including all the land at present occupied by John Thompson, John Johnson, Caleb Buckman, Richard Harris, and myself, together with all the buildings thereon; and also all the land lying on the north side

of the road bounded by the water, and in front of all the aforesaid twenty-seven acres, and on the said east side—together with all the stores, buildings, wharfs, ferry-boats, and the exclusive privilege of keeping a ferry; and also the advantages and appurtenances of every kind to the same belonging, to the only proper use, benefit, and behoof of him, the said John P. Ryers, his heirs and assigns, forever.

Item. I give and bequeath to my son, John P. Ryers, all my household furniture—carts, wagons, carriages, stock, and implements of husbandry—his heirs and assigns forever. My negro men, James and Jo, I leave to be free.

Item. It is my will, and I do order and direct my executors hereinafter named, to sell my other negroes, male and female, and the monies arising therefrom I leave to be divided equally between my son and daughter, John and Margaret.

Item. I give and bequeath unto my daughter, Margaret, the house in which she now lives, and all the houses on the east side of the line of the land heretofore devised, beginning on the road at Simonson's line, thence along said road to the southeast corner of my hay-house, thence southerly along the line of the land heretofore devised to my son John, to John Dunn's land, containing about thirteen acres and half an acre; and also about thirty acres of land which I got of my late wife, deceased, called the Wood-pasture, for and during the natural life of my said daughter, and at her decease to my grand-son, Ryers De Hart, his heirs and assigns forever, with all and singular, the buildings and improvements; and, item—I give and bequeath all my backlands to my grand-children, now living, and to those that may be born hereafter, share and share alike in severalty: each to receive his or her share as they respectively become of age, and to their heirs and assigns forever; and it is my will that my executors hereinafter named, whenever an opportunity offers of advantageously selling the backland or any part thereof to settlers, they are hereby invested with discretionary power to dispose of the same at private or public sale, and the monies arising therefrom shall be invested in the funds of the United States or in bank stock, for the sole benefit and advantage of the respective heirs (my grand-children ;) and it is my will, and I do hereby authorize, empower, and direct my said executors hereinafter named to sell and dispose of the residue of my real estate, or so much thereof as may be required towards the payment and satisfaction of all just debts and demands of whatsoever nature may appear against me and my estate.

Item. I give and bequeath all the residue and remainder of my estate as well real as personal, after payment of my debts, to be divided in the following manner, to wit: two-thirds part to my son, John P. Ryers, his heirs and assigns forever; and the other one-third part to my grand-son, Ryers De Hart, his heirs and assigns, with this provisio and condition: and it is my will, and I do hereby order and direct my said executors to pay the interest or income arising from the one-third part of my residuary property (devised to my grand-son, Ryers De Hart) to my daughter, Margaret, annually, during her natural life; and in case of the death of my said grand-son, Ryers De Hart, without lawful issue—then, and in

that case, all the estate devised to him shall revert and go to my son, John P. Ryers, his heirs and assigns forever; and in case of the previous death of my said son, John P. Ryers, then to my said son's children, born and to be born, in equal shares to them, their heirs and assigns forever; and lastly, I do nominate and appoint my son, John P. Ryers, and my brother, Lewis Ryers, my true and only executors of this my last will and testament. In witness whereof, &c. &c.

21st day of October, 1800.

D.

Mortgage of Gozen Ryers to loan officers. Description of boundaries, dated 27th Sept., 1792. "All that certain tract, piece, or parcel of land situate, lying, and being in Northfield, in the county of Richmond, beginning at the northwest corner of the store-house on the dock or wharf, and running from thence along the creek or run of water northwest to river Kill Van Kull; and, thence, along the said river Kill Van Kull, easterly as it runs to the place of beginning, bounded on the south and west by the said river, containing (except one acre of land belonging to the Dower Corson, and his improvements) twenty-seven acres of land, be the same more or less.

E.

Memorandum that Gozen Ryers, (of the county and State of New York,) Esquire, did on the day and year above mentioned, for and in consideration of the sum of four thousand dollars, lawful money of the State of New York, and the interest thereof, mortgage unto Richard Waln, of the county of Monmouth, and State of New Jersey, gentleman, and to his heirs and assigns forever, "all that certain piece or parcel of land situate, lying, and being, in the township of Northfield, in the county of Richmond, and State of New York, and bounded as follows: beginning at the southeast corner of the new Dutch church yard, on the highway that leads from said Gozen Ryer's ferry to Richmond town, and running from thence southerly along the said highway to the line of Mrs. Garrison's land, until it reaches the east line of Mrs. Vanpelt's land; from thence, northerly along said east line of widow Vanpelt's land, to the river crossing the highway that leads from the said Gozen Ryers' ferry to Elizabethtown point; and from thence, the course of the river, down the same river called by Kill Van Kull, to the dock in front of the house now occupied by John Thompson; and from thence, a southeasterly course to the place of beginning, containing within the said bounds thirty-five acres, be the same more or less, with the rights, members, hereditaments and appurtenances, together with all and singular the houses, buildings, tenements, water *water* courses, ways, and privileges to the same belonging, or in any wise appertaining, &c. &c.

F.

Memorandum that John P. Ryers, of the city of New York, merchant, did on the day and in the year above mentioned, mortgage unto Richard

of the road bounded by the water, and in front of all the aforesaid twenty-seven acres, and on the said east side—together with all the stores, buildings, wharfs, ferry-boats, and the exclusive privilege of keeping a ferry; and also the advantages and appurtenances of every kind to the same belonging, to the only proper use, benefit, and behoof of him, the said John P. Ryers, his heirs and assigns, forever.

Item. I give and bequeath to my son, John P. Ryers, all my household furniture—carts, wagons, carriages, stock, and implements of husbandry—his heirs and assigns forever. My negro men, James and Jo, I leave to be free.

Item. It is my will, and I do order and direct my executors hereinafter named, to sell my other negroes, male and female, and the monies arising therefrom I leave to be divided equally between my son and daughter, John and Margaret.

Item. I give and bequeath unto my daughter, Margaret, the house in which she now lives, and all the houses on the east side of the line of the land heretofore devised, beginning on the road at Simonson's line, thence along said road to the southeast corner of my hay-house, thence southerly along the line of the land heretofore devised to my son John, to John Dunn's land, containing about thirteen acres and half an acre; and also about thirty acres of land which I got of my late wife, deceased, called the Wood-pasture, for and during the natural life of my said daughter, and at her decease to my grand-son, Ryers De Hart, his heirs and assigns forever, with all and singular, the buildings and improvements; and, item—I give and bequeath all my backlands to my grand-children, now living, and to those that may be born hereafter, share and share alike in severalty: each to receive his or her share as they respectively become of age, and to their heirs and assigns forever; and it is my will that my executors hereinafter named, whenever an opportunity offers of advantageously selling the backland or any part thereof to settlers, they are hereby invested with discretionary power to dispose of the same at private or public sale, and the monies arising therefrom shall be invested in the funds of the United States or in bank stock, for the sole benefit and advantage of the respective heirs (my grand-children;) and it is my will, and I do hereby authorize, empower, and direct my said executors hereinafter named to sell and dispose of the residue of my real estate, or so much thereof as may be required towards the payment and satisfaction of all just debts and demands of whatsoever nature may appear against me and my estate.

Item. I give and bequeath all the residue and remainder of my estate as well real as personal, after payment of my debts, to be divided in the following manner, to wit: two-thirds part to my son, John P. Ryers, his heirs and assigns forever; and the other one-third part to my grand-son, Ryers De Hart, his heirs and assigns, with this provisio and condition: and it is my will, and I do hereby order and direct my said executors to pay the interest or income arising from the one-third part of my residuary property (devised to my grand-son, Ryers De Hart) to my daughter, Margaret, annually, during her natural life; and in case of the death of my said grand-son, Ryers De Hart, without lawful issue—then, and in

that case, all the estate devised to him shall revert and go to my son, John P. Ryers, his heirs and assigns forever; and in case of the previous death of my said son, John P. Ryers, then to my said son's children, born and to be born, in equal shares to them, their heirs and assigns forever; and lastly, I do nominate and appoint my son, John P. Ryers, and my brother, Lewis Ryers, my true and only executors of this my last will and testament. In witness whereof, &c. &c.

21st day of October, 1800.

D.

Mortgage of Gozen Ryers to loan officers. Description of boundaries, dated 27th Sept., 1792. "All that certain tract, piece, or parcel of land situate, lying, and being in Northfield, in the county of Richmond, beginning at the northwest corner of the store-house on the dock or wharf, and running from thence along the creek or run of water northwest to river Kill Van Kull; and, thence, along the said river Kill Van Kull, easterly as it runs to the place of beginning, bounded on the south and west by the said river, containing (except one acre of land belonging to the Dower Corson, and his improvements) twenty-seven acres of land, be the same more or less.

E.

Memorandum that Gozen Ryers, (of the county and State of New York,) Esquire, did on the day and year above mentioned, for and in consideration of the sum of four thousand dollars, lawful money of the State of New York, and the interest thereof, mortgage unto Richard Waln, of the county of Monmouth, and State of New Jersey, gentleman, and to his heirs and assigns forever, "all that certain piece or parcel of land situate, lying, and being, in the township of Northfield, in the county of Richmond, and State of New York, and bounded as follows: beginning at the southeast corner of the new Dutch church yard, on the highway that leads from said Gozen Ryer's ferry to Richmond town, and running from thence southerly along the said highway to the line of Mrs. Garrison's land, until it reaches the east line of Mrs. Vanpelt's land; from thence, northerly along said east line of widow Vanpelt's land, to the river crossing the highway that leads from the said Gozen Ryers' ferry to Elizabethtown point; and from thence, the course of the river, down the same river called by Kill Van Kull, to the dock in front of the house now occupied by John Thompson; and from thence, a southeasterly course to the place of beginning, containing within the said bounds thirty-five acres, be the same more or less, with the rights, members, hereditaments and appurtenances, together with all and singular the houses, buildings, tenements, water *water* courses, ways, and privileges to the same belonging, or in any wise appertaining, &c. &c.

F.

Memorandum that John P. Ryers, of the city of New York, merchant, did on the day and in the year above mentioned, mortgage unto Richard

Waln, of the county of Monmouth, and State of New Jersey, gentleman, and to his heirs and assigns, all that certain tract, piece, or parcel of land, and tenements thereon, situate, lying, and being in the county of Richmond, town of Northfield, and State of New York, and butted and bounded as follows: beginning at the southeast corner of the Dutch church, and running along the main road south to the corner of the land late the property of Daniel Garrison deceased, and from thence along the line of the said Garrison's land, westerly to the land belonging to the heirs of Peter Vanpelt; and thence, along said land to the kills; and from thence down the shore easterly to the house now occupied by Samuel Randolph, and from thence to the place of beginning; including within said boundaries all the lands and houses occupied by Samuel Randolph, Colod Buckman, Richard Harris, and John Johnson, which said premises was bequeathed and devised to the said John P. Ryers, by his father Gozen Ryers, lately deceased, as per the last will and testament of the said Gozen Ryers, will more clearly appear with the rights, members, hereditaments, and appurtenances, together with, &c.

Recorded the following deed at the particular request of Mr. Alexander Cairnes, the seventeenth day of August, in the year of our Lord one thousand eight hundred and five, (1805.)

G.

This indenture, made the seventh day of August, in the year of our Lord one thousand eight hundred and five, between Pierre C. Vanwick, master in chancery for the State of New York, of the one part, and Alexander Cairnes, of the county of Richmond, and State of New York, of the second part.

Whereas Gozen Ryers, formerly of the county of Richmond, Esquire, being indebted unto Richard Waler, of Walnford, in the county of Monmouth, and State of New Jersey, gentleman, upon a certain bond or obligation bearing date the fifth day of June, one thousand eight hundred, in the penal sum of four thousand dollars, conditioned for the payment of the sum of two thousand dollars on or before the fifth day of June, then next ensuing, with interest, did, in order to secure the payment thereof, by a certain indenture bearing even date with the said bond or obligation, grant, bargain, sell, alien, demise, release, and confirm, unto the said Richard Waler, and his heirs and assigns forever—

All those two lots of land and premises described in the said indenture, as follows: all that certain piece or property of land situate, lying, and being in the township of Northfield, in the county of Richmond, and State of New York, and bounded as follows: beginning at the southeast corner of the new Dutch church yard, on the highway that leads from said Gozen Ryers' ferry, to Richmondtown, and running from thence southerly along the said highway to the line of Mrs. Garretson's land, widow of Daniel Garretson, deceased; from thence, westerly course along the line of land of said widow Garretson's land, until it meets the east line of Mrs. Vanpelt's land; from thence, northerly, along said east line of widow Vanpelt's land to the river crossing the highway that leads from

the said Gozen Ryer's ferry to Elizabethtown point; and from thence, the course is of the river down the same river called by Kill Van Kull, to the dock in front of the House now occupied by John Thompson; and from thence, southeasterly course, to place of beginning, containing, within the said bounds, thirty-five acres, be the same more or less, with the rights, hereditaments, and appurtenances;

Together with all and singular the houses, buildings, tenements, water-*water* courses, ways, and privileges to the same belonging, or in any ways appertaining. To have and to hold, unto the said Richard Waler, his heirs and assigns forever; upon condition, nevertheless, that if the said Gozen Ryers, his heirs, executors, or administrators, shall pay to the said Richard Waler, or his executors, administrators, or assigns, the just and full sum of two thousand dollars, as mentioned in the condition of the bond aforementioned, then the said indenture, as well as the said written obligatory, were to cease and become void, which said indenture was duly registered in the clerk's office, of the county of Richmond, on the sixth day of June, in the year one thousand eight hundred. And, whereas, after the execution of the said indenture, and before the payment of the said sum of money, with the said obligation mentioned, the said Gozen Ryers did, by his last will and testament duly executed under his hand and seal, dated the twenty-first day of October, one thousand eight hundred, devise to his son John P. Ryers, and his heirs and assigns forever, all and singular that tract of land and premises as before described, and also died without altering or revoking the same. And, whereas, also the said John P. Ryers being justly indebted and bound in a bond or obligation unto the said Richard Waler, bearing date the first day of July, one thousand eight hundred and two, in the penal sum three thousand dollars, conditioned for the payment of one thousand five hundred *dollars*, lawful money of the United States, on or before the first day of July then next ensuing the date of the said bond with the lawful interest for the same. And the said John P. Ryers, in order to secure the payment of the said sum of money, mentioned in the said last mentioned bond, did execute to the said Richard Waller a mortgage bearing even date with the said bond, and made by and between the said John P. Ryers, of the city of New York, merchant, of the first part, and Richard Waler, of the county of Monmouth and State of New Jersey, gentleman, of the second part, whereby the said John P. Ryers did sell and convey all these two lots of land and premises described in the said indenture, as follows; and also that certain tract, pieces or parcels, of land and tenements thereon, situate, lying, and being in the county of Richmond, town of Northfield, and State of New York, and butted and bounded as follows: beginning at the southeast corner of the Dutch church, and running along the main road south to the corner of the land late the property of Daniel Garretson, deceased, and from thence along the line of said Garretson's land westerly to the land belonging to the heirs of Peter Vanpelt, deceased, and thence along the said land to the kills, and from thence down the shore easterly to the house now occupied by Samuel Randolph, and from thence to the place of beginning; including within the said boundaries all the lands and houses now or late occupied by Samuel Ran-

dolph, Caleb Beeckman, Richard Harris, and John Johnson, which said premises was bequeathed and devised to the said John P. Ryers by his father Gozen Ryers, lately deceased, as by the last will and testament of the said Gozen Ryers will more clearly appear, with a proviso, nevertheless, therein contained, that if the said John P. Ryers, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, the said sum of one thousand five hundred dollars with the interest thereon, unto the said Richard Waler, or his certain attorney, executors, administrators, or assigns, on or before the first day of July next ensuing the date thereof, according to the true intent and meaning of the condition of the said last mentioned bond, then and from thenceforth the said last mentioned mortgage was to cease, determine, and be utterly void; which said mortgage was duly registered in the clerk's office of the county of Richmond, on the nineteenth day of July, in the year one thousand eight hundred and two. And, whereas, default has been made by the said Gozen Ryers in his lifetime, and by John P. Ryers since his decease, in the payment in the said several sums of money mentioned in the said conditions of the said several bonds or obligations abovementioned. And whereas the said Richard Waler exhibited in the court of chancery of the State of New York, his bill of complaint against the said John P. Ryers and Frederick Depuyster, setting forth in substance the premises, and praying that all the right of equity of redemption, of the said John P. Ryers, in the said mortgaged premises, might be foreclosed by a decree of said court, and that the said mortgaged premises might be sold under a decree of said court, and that the proceeds of said sale might be applied towards the discharge of the principal and interest due on the said bonds and indenture of mortgages.

And whereas the said John P. Ryers did appear in the said court, to the said bill, and filed his answer thereto, whereby all the proceedings and facts set forth in the said bill were admitted to be true.

And whereas such proceedings were thereupon had in said court, upon the said bill and answer, as that it was decreed, ordered, and adjudged, by the said court, on the tenth day of April last past, that all and singular the said mortgaged premises herein before described should be sold at public vendue, under the superintendance of one of the masters of the said court, first given due notice of the same in two of the public newspapers printed in the city of New York, and that such master execute a conveyance or conveyances to the purchaser or purchasers of the same. And whereas the said Pierre C. Van Wicke, master in chancery aforesaid, in pursuance of the said decree of the said court of chancery, and in execution thereof.

H.

To all christian people, to whom these presents shall come, I Henry Cruze, of the parish and county of Richmond, on Staten Island, and province of New York, yeoman, send greeting: Know ye, that I, Henry Cruze, for and in consideration of the love, good will, and affection which I have and do bear towards my loving daughter, Cornelia Corson, of the aforesaid parish and county of Richmond on Staten Island, have given

and granted, and by these presents do fully, freely, clearly, and absolutely give and grant to the said Cornelia Corson, her heirs and assigns, all that certain piece and parcel or lot of land situate, lying and being on the north side of Staten Island, in the county of Richmond, and formerly belonging to Catharine Houghland and Douwee Woogelom, the which, I, the above said Henry Cruze, bought from John Van Pelt and Alice his wife, on the third day of June, in the year of our Lord 1741, bounded on the southeast by the road as leads to Richmond town, on the southwest by the mowing land of Jacob Corson, senior, northwest by the road leading to Elizabethtown point, on the northeast by the Dutch churchyard or burying ground, as also a small point of land adjoining to the Dutch church on the northeast of the said church, so running between the two roads to a sharp point, or as the aforesaid lot stands in fence and the point out of fence, as it was in the possession of John Van Pelt, and commonly known by the name of his mowing lot, being in estimation, one acre and half, be it more or less, as it now stands in fence and aforesaid; together with all the right, title, interest, claim, and demand whatsoever, which I now have, or which any or either of my heirs, executors, administrators, assigns, may hereafter have of and in the said granted premises or any part thereof. To have and to hold the said piece and parcel or lot of land unto her, the said Cornelia Corson, her heirs and assigns forever, absolutely, within any manner of condition, as I the said Henry Cruze have fully, freely, and absolutely, and of my own accord, let and put in further testimony.

In witness whereof I have hereunto set my hand and seal this thirteenth day of March, in the year of our Lord one thousand seven hundred and forty-two.

HENDRICK KROESEN, [SEAL.]

Sealed and delivered in the presence of
JOHN SMITH,
ANDREW WRIGHT.

(No. I.)

By his Excellency, Robert Hunter, Esq., Capt. General and Governor in Chief of the provinces of New York, New Jersey, and territories therein depending in America, and Vice Admiral of the same, &c.

To all to whom these presents shall come or may in anywise concern, greeting: Whereas Garret Veghte, Johannes Hooglandt, Christian Corson, Jacob Corson, and Henry Corson, for themselves and several more of the inhabitants of the county of Richmond, members of the Dutch congregation, being protestants, by their humble petition, this day presented unto me, setting forth that the said petitioners for themselves and several others of the said Island are desirous to meet and build a meeting house in some convenient place at the north side of said Island, at their own costs and charges, in order to use and exercise the holy service of the protestant religion on Sundays and other days, and praying that they may have liberty for erecting and building of the same. I do, therefore, by these presents give and grant full and free liberty, power, and license to

the said Garret Veghte, Thomas Hooglandt, Christina Corson, Jacob Corson, and Henry Corson, for themselves and such other members of the said Dutch protestant congregation aforesaid, to erect and build such meeting-house for the service aforesaid.

Given under my hand and seal at Fort George, in New York, this seventeenth day of February, in the first year of the reign of our sovereign lord, George, by the grace of God, of Great Britain, France, and Ireland, King, defender of the faith, &c., Anno Domini, 1714.

RO. HUNTER.

By his Excellency's command, by

W. WILDMANS, D. Sec'ry.

(No. II.)

Know ye, that I, Doick Hooglandt, for and in consideration of the love, good will, and affection I have and bear towards my beloved friends, Garret Veghte, Johannes Hooglandt, Laurient De Camp, Christian Corson, and Barent Martling, constitute to the erection and building of a house of congregation for the reformed Dutch church of the said county of Richmond, have given and granted, and by these presents, do fully, freely, clearly, and absolutely give and grant to the said Garret Veghte, Johannes Hooglandt, Laurent De Camp, Christian Corson, and Barent Martling, their heirs and assigns, all that one, all that certain piece of land situate in the said county of Richmond, on the north side next contiguous to the burial place, where at present the house of congregation is standing, and no more. Together with all the right, title, interest, claim, and demand whatsoever, which I now have or which any or either of my heirs, executors, administrators, or assigns may hereafter have of, to, or in the said granted premises, or any part thereof; to have and to hold the said piece of ground, unto them, the said Garret Veghte, Johannes Hooglandt, Laurent De Camp, Christian Corson, and Barent Martling, their heirs and assigns forever, absolutely, without any manner of condition, as I, the said Doick Hooglandt have fully, freely, and absolutely, and of my own accord, set and put in further testimony.

In witness whereof, I have hereunto set my hand and seal the 24th day of January, A. D., 1720.

DYCK HOOGLANDT, [SEAL.]

Signed sealed and delivered in the presence of

JOHN VEGHTE,
JNO VAN ZOLT.

The following roads or highways, being the road from Darby Doyle's ferry to Elizabethtown point, also from the Dutch church to Richmondtown, being entered on record this 14th day of March, Anno Domini, 1774.

(No. III.)

RICHMOND, ss.

We, Richard Lawrence and Barent Simonson, the commissioners chosen, in the north precinct of Richmond county, for laying out and regu-

lating highways, and John Pollon, one of the commissioners in the south precinct of said county, for laying out and regulating highways, and John Totton, one of the commissioners chosen in the west precinct of said county for laying out and regulating highways, and Daniel Corson, one of the commissioners chosen in the manor of Castletown, of said county, for laying and regulating highways in said county, and also to perform all the services enjoined upon us by virtue of an act of the Governor, Council, and General Assembly, passed the eighth day of March, Anno Domini, one thousand seven hundred and seventy-three.

And whereas, we have, in pursuance of our authority as commissioners for said county, taken a view of the respective highways in the said precincts, and the same appearing to be really too narrow and inconvenient for to commode the inhabitants and public in general, have regulated and opened the roads in the manner hereafter described, to wit: Beginning at Darby Doyle's ferry, from thence, as the pond now runs, open to the north from the bank to a peach tree marked on the west side of the road, from thence as the road now runs to the partition fence between Doyles' and the Glebe, to be open two and a half rods from the edge of the bank, and from thence along the Glebe, to be open two and a half rods as the road runs to the land of Captain Seaks, to be two and a half rods from the gulley to stakes set up to the east of said gulleys, and so along the said Seak's land as the road now runs, to open to the south from the head of the gulley to Wandel's land, from thence as the road now runs along the bank of Kell-van-Kill two and a half rods to the south of the head of the gulleys to the widow Van Kight's bridge, and over the bridge and crossway as the road now runs to the land of Adrian Bancker, and trom thence, as the road now runs, two and a half rods to the south of the head of the gulleys to a bridge over a small creek near the house of Lawrence Roome, and over said bridge as the road runs to Dougan's mill, two and a half rods to the south of the head of the gulleys, and over the mill dam as the road now runs to the Dutch church, and then over the bridge, as the road now runs to Richard Lawrence's ship yard to be two and a half rods to the north, and then as the road now runs along Kill-Van-Kill open to the south two rods and a half from the head of the gulleys on the bank to stakes put up through the land of widow Ellis, Joshua Muserean, Esq., and so to the land of the widow Garbrants, and so through said lane as the road now goes to David Muserean's lane, and through his lane as the road now goes along the bank to the land of Aaron Nanne, Esq., and from thence as the road now runs two and a half rods from the head of the gulleys, open to the south, and from thence as the road runs through Depart's lane to Peter Post's house, the whole road from the said Doyles to the said Posts to be two and a half rods wide.

As also one other highway in said precinct, beginning at the water side between the land of Capt. McDonald and the Dutch church, so running to the southward, as the road now runs, and to open on the land of Capt. McDonald to Posthill, and so along as the road runs, to be open to the west on the land of John Simonson, and from thence as the road runs to the corner of Capt. McDonald, and so across his corner till you come to the centre to Charles Vansie's fence, to be opened on both sides equal, so

as to be ten and a half rods wide, and from thence, as the road now runs, to Daniel Corson's land, from thence as the road now runs to the land of Matthew Decken, and from thence as the road now runs, to open to the west, to the land Merrill, and from thence as the road now runs, open to the west to the Widow Haughwout's lands, and from thence as the road now runs, open to the east, to the lands of Widow Merrill and Son Merrill, and from thence as the road now runs, open to the west, to the lands of Edward Jones, and from thence as the road now runs, to a stake standing about four feet to the west of an elm tree, and from thence to the bridge near Abraham Crocheran's house, to open to the east, and from thence to open to the west, as the road now runs, to the land of Richard Wood, and from thence as the road now runs, to be opened on both sides equal, between Abraham Jones and Richard Wood, to the corner of the lands of Joseph Christopher, and so along as the road now runs to the centre of the road that leads to Richmond town, and so round the corner of Abraham Jones' fence till it comes to an apple tree in Johannes Decken's land near the stone fence, and from the apple tree running southeast with an allowance of three degrees variation to a wild-cherry tree, and from thence to a pine fence so as the road to be two and a half rods wide in the whole, to continue on the north side of said line to the rear of the land of Johannes Decken, or to the road now closed, and so along the rear of said Decken, as the road now runs, open to the west, and so to the bridge at the foot of the fresh meadow, and over said bridge, as the road now runs, open to the east at the bridge to the top of the hill, open on Joseph Wood's lands to the west, and from thence, as the road now runs, down said hill, to the town bridge at the head of the fresh kills, the said road to be two and a half rods wide from the beginning to the said bridge. And we do hereby desire the clerk of said county to enter the aforesaid two roads upon record.

As witness our hands this twenty-fifth day of January, Anno Domini, 1774.

RICHARD LAWRENCE,
JOHN POILLON,
JOHN TOTTON.

RICHMOND COUNTY, Clerk's Office, ss.

I do hereby certify that the foregoing is a true copy of the original as recorded in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said county, the twenty-third day of October, 1837.

WALTER BETTS, Clerk.

I.

Recorded at the request of Gozen Ryers, Esq., the following indenture, the sixteenth day of September, 1786.

This indenture, made this seventh day of July, in the year of our Lord one thousand seven hundred and eighty-six, between Alexander McDon-

ald, (of Westmoreland, on the island of Jamaica,) Esquire, by John Witherspoon and John Rutherford, his attorneys of the one part, and Gozen Ryers (of Staten Island, in the State of New York,) Esquire, of the other part. Whereas, the said Alexander McDonald, by a letter of attorney, bearing date the fourth day of June, in the year of our Lord one thousand seven hundred and eighty-five, and which is recorded in the secretary's office, of the State of New York, in book of deeds, commencing the twenty-fifth day of November, one thousand seven hundred and seventy-four, page four hundred and thirty-five, &c., did make, ordain, constitute, and appoint the Reverend Doctor John Wetherspoon, president of the college of New Jersey, and John Rutherford, Esq., attorney at law, New York, both of North America, his true and lawful attorneys, for himself, and in his name to grant, bargain and sell, release and confirm all that certain messuage, tract of land, farm and plantations, situate, lying and being on the north side of Staten Island, in Richmond county in the State of New York, bounded northerly by Kill-Van-Kull, easterly, partly by a messuage and piece of land now or late belonging to Anthony White, partly by land now or late belonging to Anne Grouseibeek, partly by certain tract of seventeen acres of land purchased by Anthony White, head waters, in his lifetime, of Yeneich, hereinafter mentioned and described, and partly by land late belonging to Abraham Barcalow, deceased; southerly, by the woodland of the late Jacob Caursen, and westerly, *and westerly* by a highway as the same *paid* runs, which said highway containing, by estimation, about one hundred and nine acres, be the same more or less, and also all that certain lot of salt meadow, containing about eight acres, being the lot of salt meadow always deemed and reputed to belong to Scott T. Ames and Staten Island, aforesaid, by virtue of Andress Qurencesis' right, and also all that certain lot of wood land situate, lying, and being on Staten Island aforesaid, in the said county of Richmond, bounded westerly by the said woodland of Jacob Coursen, northerly, partly by the said land late belonging to the said Abraham Barcalow, deceased, and partly by other lands of the said Jacob Coursen, easterly, partly by other lands of the said Abraham Barcalow, deceased, and partly by land late of Roper Dawsen, deceased, and southerly by the highway which runs between the said wood lots and the lots called the soldiers' lots, and containing about forty acres, be the same more or less. And also all that certain tract of land lying and being in Staten Island aforesaid, county of Richmond, bounded southeasterly, land of the said Jacob Courson, southardly by the said land late of the said Abraham Barcalow, deceased, northwest by the said tract of land herein first mentioned and described, and northeast by said land of the said late Anne Grosbeek, containing seventeen acres, together with the free liberty from time to time, and at all times forever hereafter, to pass and repass with cattle, horses, and carriages, or any other method the most convenient, through the road left in the said land of Anne Grosbeek, between the said last mentioned tract of land hereby to be granted and the public road. And the said Alexander McDonald by the said letter of attorney, did fully authorize and empower the said attorneys to grant, bargain, and sell all his estate, right, title, interest, claim, and demand whatever, of, in and

to the above described premises, and every part thereof, unto any person or persons whatsoever, their heirs and assigns forever, and for him and in his name, place, and stead, and as his proper act and deed to execute, sell, and deliver such conveyances and assurances of the said premises to the purchaser or purchasers thereof as should be needful and requisite, as by the said letter of attorneys or the record thereof, reference being thereunto had, may more fully and at large appear. Now, this Indenture witnesseth that the said Alexander McDonald, by his attorney aforesaid, for and in consideration of the sum of two thousand pounds lawful money of the state of New York, well and truly by the said Gozen Ryers, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, aliened, released, and confirmed, by these presents doth grant, bargain, and sell, alien, release, convey and confirm, unto the said Gozen Ryers, the above described premises, and every part thereof, being butted and bounded as is herein before particularly mentioned in his actual possession, now being by virtue of a bargain and sale to him thereof made for one whole year by indenture, bearing date the day next before the day of the date of these presents, and by force of the statute for transferring use into possession, and to his heirs and assigns forever; together with all and singular the houses barns, stables, buildings, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, woods, underwoods, trees, timber, fences, improvements, ways, water, water courses, mines, minerals, quarries, huntings, hawking, fisheries, privileges, profits, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the same belonging or in anywise appertaining, and all the estate, right, title, interest, trust, property, possession, claim, and demand both at law and equity, of him, the said Alexander McDonald, of, in and to the same. To have and to hold the above described premises, with the appurtenances, to the said Gozen Ryers or his heirs and assigns, to the only proper use, benefit, and behoof of the said Gozen Ryers or his heirs and assigns forever; and the said Alexander McDonald, by his attorneys aforesaid, for himself, his heirs, executors, and administrators, doth hereby grant and agree to and with the said Gozen Ryers, or his heirs and assigns, in manner following, that is to say; that the said Alexander McDonald at and before the ensealing and delivery of these presents, is lawfully and rightfully seized in his own right of a good, sure and perfect and indefeasible estate of inheritance in fee simple of and in the hereby released premises with the appurtenances, without any manner of condition or limitations of use or uses to alter, change, or charge, determine or defeat the same, and that he hath in himself good rightful power and lawful and absolute authority to grant, bargain, and sell, release, and convey the same and every part thereof to the said Gozen Ryers in manner and form as aforesaid, and also that the said Gozen Ryers, his heirs and assigns, shall and may from time to time, and at all times forever hereafter peaceably and quietly have, hold, and occupy, possess and enjoy, all singular, the above described premises, with the appurtenances, and all rents, issues, and profits, to take, receive, and enjoy, to his and their name and use forever, without any let, suit, trouble, denial, hindrance, eviction, molestation, or interruption whatsoever, by

him *by him* the said Alexander McDonald, his heirs, assigns, or any other person or persons whatsoever lawfully claiming or to claim any estate, right, title and interest of, in and to the same or any part thereof, shall be and remain free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise well and sufficiently indemnified, saved, and kept harmless of and from all former and other gifts, grants, bargains, sales, leases, mortgages, judgments, rents, and arrearages of rents, and of and from all other charges and incumbrances whatsoever, had made, committed, done, or suffered by him, the said Alexander McDonald, or any other person or persons whatsoever. And lastly, that the said Alexander McDonald and his heirs, all and singular, the hereby released premises and every part thereof unto the said Gozen Ryers, his heirs and assigns, against him the said Alexander McDonald, his heirs and assigns, and against all and every other person and persons whatsoever having or lawfully claiming any estate, right, title, or interest, of, in and to the same or any part thereof, shall and will by these presents forever warrant and defend.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

ALEXANDER McDONALD,
By his Attorneys.
JOHN WETHERSPOON, [SEAL.]
JOHN RUTHERFORD, [SEAL.]

Sealed and delivered in the presence of
DAVID C. FRANKS,
DEBORAH BRADFORD.

Be it remembered, that on the eleventh day of July, in the year of our Lord one thousand seven hundred and eighty-six, personally appeared before me, Richard Morrise, Esquire, chief justice of the State of New York, David C. Franks, one of the subscribing witnesses to the within instruments, who, being sworn, made oath that the said John Wetherspoon and John Rutherford, attorneys to Alexander McDonald, seal and deliver the within instrument, as the act and deed of the said Alexander McDonald, and for the use and purposes therein, have returned; and that Deborah Bradford, the other subscribing witness, did also subscribe her name as a witness to the execution thereof; and I, having inspected the same, and finding no material erasures or interlineations therein, do allow the same to be recorded. RICHARD MORRIS.

RICHMOND COUNTY, } *ss.*
Clerk's Office. }

I do hereby certify, that the foregoing is a true copy of the original, as recorded in this office.

In testimony whereof, I have hereunto set my hand, and affixed the [SEAL.] seal of the said county, the twenty-fourth day of November, 1837. WALTER BETTS, Clerk.

(No. 4.)

The two following certificates, &c., were recorded at the desire and request of the Minister, Elders and Deacons of the Dutch Reformed Protestant Church, in this county, the fifteenth day of August, in the year of our Lord one thousand seven hundred and ninety-two.

(No. 1.)

We, John Van Pelt, William Merrill and Abraham Prall, the Trustees of the Reformed Protestant Dutch Church, or Association, on Staten Island, duly elected and appointed, in pursuance of an act of the Legislature of the State of New York, entitled "an act to enable all the religious denominations in this State to appoint trustees, who shall be a body corporate, for the purpose of taking care of the Temporalities of their respective congregations, and for other purposes therein mentioned," passed the 6th of April, 1784, do hereby certify and declare, that it is our will not to continue longer a body corporate. The intention of this certificate being to give the said church congregation an opportunity to avail themselves of the benefit intended to Reformed Protestant Dutch congregations, by an act of the said Legislature entitled "an Act making such alterations in the act for incorporating religious societies, as to render the same more convenient to the Reformed Protestant Dutch congregation," passed the 7th of March, 1788.

Given at Staten Island, signed with our names, and sealed with our seals, this 13th day of August, A. D. 1792.

JOHN VAN PELT, [L. S.]
WILLIAM MERRILL, [L. S.]
ABRAHAM PRALL, [L. S.]

Signed and sealed in the presence of us,
CORNELIUS CRUSER,
CORNELIUS MERSEREAU.

RICHMOND COUNTY, *ss.*

Be it remembered, that on this fourteenth day of August, in the year of our Lord one thousand seven hundred and ninety-two, before me, Gozen Ryerss, one of the judges of the inferior court of common pleas, of the county of Richmond aforesaid, Cornelius Cruser, who, being by me sworn, on the Holy Evangelist of Almighty God, did declare, that he was present, and saw John Van Pelt, William Merrill, and Abraham Prall, being the trustees of the Reformed Protestant Dutch church or congregation, on Staten Island, severally sign and seal the preceding certificate, as and for their and each of their several and respective voluntary act and deed, for the uses and purposes therein mentioned, and that he subscribed his name as a witness to the execution thereof, together with, and in the presence of Cornelius Mersereau, the other subscribing witness. And I having examined the same, and finding no erasures and interlineations therein, do allow the same to be recorded. GOZEN RYERSS.

(No. 2.)

We, the minister, elders and deacons of the Reformed Protestant Dutch church, on Staten Island, do hereby certify, agreeably to an act of the Legislature of the State of New York, entitled "An act making such alterations in the act for incorporating religious societies, as to render the same more convenient to the Reformed Protestant Dutch congregations." passed the 7th of March, 1788; that we do hereby take the name, style and title of the Reformed Protestant Dutch church on Staten Island, for ourselves and our successors forever, to be a body corporate, by virtue of the said act, and by that name and style to be called, distinguished and known.

Given at Staten Island, signed with our names, and sealed with our seals, this thirteenth day of August, in the year of our Lord, one thousand seven hundred and ninety-two.

P. STRYKER, [L. S.]
HENDRICH GARRISON, [L. S.]
WILLIAM MERRILL, [L. S.]
ABRAHAM PRALL, [L. S.]
JOHN VAN PELT, [L. S.]
NICHOLAS HAUGHWOUT, [L. S.]
PETER HAUGHWOUT. [L. S.]

Signed and sealed in the presence of us,
CORNELIUS CRUSER,
CORNELIUS MERSEREAU.

RICHMOND COUNTY, *ss.*

Be it remembered, that on the fourteenth day of August, in the year of our Lord one thousand seven hundred and ninety-two, before me, Gozen Ryerss, Esquire, one of the judges of the inferior court of common pleas, of the county of Richmond aforesaid, Cornelius Cruser, who, being by me sworn on the Holy Evangelists of Almighty God, did declare, that he was present at, and saw the Rev. Peter Stryker, Hendrich Garrison, William Merrill, Abraham Prall, John Van Pelt, Nicholas Haughwout, and Peter Haughwout, being the present minister, elders and deacons of the Reformed Protestant Dutch church or congregation, on Staten Island, severally sign and seal the preceding certificate, as and for their and each of their several and respective voluntary act and deed, for the uses and purposes therein mentioned, and that he subscribed his name as a witness to the execution thereof, together with, and in the presence of Cornelius Mersereau, the other subscribing witness. And I having examined the same, and finding no erasures and delineations therein, do allow the same to be recorded.

GOZEN RYERSS.

RICHMOND COUNTY, } *ss.*
Clerk's Office. }

I do hereby certify that the foregoing are true copies of the instruments as recorded in this office.

In testimony whereof, I have hereunto set my hand, and affixed the [SEAL.] seal of the said county, the twenty-third day of October, 1837.

WALTER BETTS, Clerk.

(No. 5.)

This indenture, made on the fifth day of December, in the year of our Lord one thousand eight hundred and twenty-seven, between the Reverend Doctor Peter T. Van Pelt, pastor of the church and president of the corporation of the same, and Jacob Tyson Zabireske, Isaac R. Houseman, Ganitry Mailtry, Richard Merrill, and Tobias Teller, elders and deacons of the Reformed Protestant Dutch Church, on Staten Island, and their successors in office, of the first part, and Mathias Haughout and Jacob Haughout, of the town of Northfield, and county of Richmond, and State of New York, gentlemen, of the second part, witnesseth that the said parties of the first part, for and in consideration of the sum of seven hundred and fifty dollars, lawful money of the United States of America, to them in hand paid by the said parties of the second part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors, and administrators, forever released and discharged from the same by these presents, hath granted, bargained, sold, alienated, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said parties of the second part, and to their heirs and assigns forever, all that certain lot, piece or parcel, of land lying and being in the town of Northfield aforesaid, which lies below the public road running from the ferry of David Mersereau, Esq., to Elizabethtown point, bounded and limited as follows, to wit: beginning at the water side or river called Kill Van Kill, on the westermost side of the public road running from said river to Richmondtown, which last mentioned road in the beginning adjoins the dock and premises of said David Mersereau, Esq., where said ferry is kept at, running from thence up the last mentioned road on the westermost side thereof, southerly to the first mentioned road; thence, along said road westerly, to the line of lands in the possession of Cornelius Sebring and others; thence, down that line northerly, to the river aforesaid; thence, along said river easterly, to the beginning; *containing* by estimation to be about one-half acre, be the same more or less. Bounded northerly by said river, easterly and southerly by said public roads, and westerly by lands of said Cornelius Sebring and others; together with all and singular the tenements, hereditaments, and appurtenances, thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, and interest, property, possession, and demand, whatsoever, as well in law as in equity, of the said parties, of the first part, of, in and to the same and every part and parcel thereof, with the appurtenances, to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said parties of the second part, their heirs and assigns, to his and their own proper use, benefit, and behoof, forever.

And the said parties of the first part, for themselves, their successors, doth covenant, grant, and agree, to and with the said parties of the second part, their heirs and assigns, that the said parties of the first part, at the time of the ensealing and delivering of these presents, are lawfully seized

in the right of said church, of a good, absolute, and indefeasible estate of inheritance, in fee simple of and in all and singular the above granted, bargained, and described premises, with the appurtenances, and hath good right, full power, and lawful authority to grant, bargain, sell, and convey, the same in manner and form aforesaid. And that the said parties of the second part, their heirs and assigns, shall and may, at all times hereafter, peaceably and quietly, have, hold, use, occupy, possess, and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance, of the said parties of the first part, their successors, or of any other person or persons lawfully claiming, or to claim the same. And that the same are now free, clear, discharged, and unencumbered, of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances, of what nature or kind soever. And also that the said parties of the first part, their successors, and all and every other person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest, of, in and to the hereinbefore granted premises, by, for, under or in trust for them, shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said parties of the second part, their heirs and assigns, make, do and execute, or cause, or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law, for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said parties of the second part, their heirs and assigns forever, as by the said parties of the second part, their heirs or assigns, or their counsel learned in the law, shall be reasonably devised, advised, required.

And the said parties of the first part, their successors, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said parties of the second part, their heirs and assigns, against the said parties of first part, and their successors, and against all and every person and persons whomsoever lawfully claiming, or to claim, the same, shall and will warrant, and by these presents forever defend.

In witness whereof the parties to these presents have hereunto interchangably set their hands and seals the day and year first above written.

P. J. VAN PELT, Pres't, [L. S.]

Sealed and delivered in the presence of
ABM. CROCHERON.

ISAAC R. HOUSEMAN,
Secretary.

And upon which trial, at the close of the testimony, the court was prayed by the plaintiff to instruct the jury as to the following points of law arising upon the facts of the case, and upon which points of law the judges divided in opinion, and the jury were thereupon discharged from the further consideration of the case; and the counsel for the plaintiff

prayed the court to cause such division of opinion to be certified to the Supreme Court, pursuant to the statute in such case made and provided.

And it is agreed between the counsel for the respective parties that the facts of the case, appearing upon the trial thereof, are corrrectly set forth in this case, and that the points of law upon which such instructions were prayed, and on which the court were divided in opinion, were the following, to wit:

1. That if the jury shall find the premises in question have been claimed as part of the Corson farm by those possessing that farm under the Corson title, and such assertion of right has been accompanied by such acts of possession as comported with the situation of the premises, or their use to the estate, or the ordinary use of the occupation of the estate, such claim and possession will be evidence of the premises belonging to that farm, although no actual enclosure or cultivation of the premises is proved.

2. That after a possession with an assertion of title for so long a period as the Corson farm has been held by Mrs. Ryers, and those claiming under her, no proof is necessary that any paper title ever existed, and no inference can be raised against her full title thereto, from not producing or not accounting for any original grant to her of the said farm.

3. That the grant in 1721 from Hooglandt, and for the benefit of the church, if ambiguous or indefinite as to its location, is to be understood in conformity with the possession and claim of title set up and continued by the church.

4. That the deed of Henry Cruzer (who is the source of the Corson title) to his daughter Cornelia Corson, in 1742, is evidence to show what at that day was claimed by him to be the limit of the church property on the north, and if in its location that deed covers any part of the premises is prima facie evidence of title to such part, or if the land conveyed by it intervenes between the church lot and the flats (part of the premises, in question,) the deed is evidence against the extension of the Hoogland grant of 1721, across the flats.

5. That if the jury believe Gozen Ryers held and claimed the Corson farm under the Corson title, then his acts of possession, and claim and assertion of title, by conveyance, by will, or verbal, while in possession, both before and after the death of his wife, are competent evidence in favor of the party legally holding that title.

6. That, so also, the acts of possession, and claim and assertion of title, verbal, or by conveyances of John P. Ryers, Alexander Cairns, on the Sebrings in regard to the premises in question, if made under and in support of the Corson title, enure to the benefit of the party now having that title.

7. That the boundaries and description of property in the mortgage of Gozen Ryers to R. Waler, are to be construed, if practicable, so as to give it effect, in conformity with the intent of the parties, and that though Sloat's dock may be most conformable to the description in the deed, yet if the boundaries cannot be closed from that monument upon the course given, nor by a straight line, without being contrary to the plain intent

of the grantor, and if Mersereau's dock is found by the jury to answer in a general sense to the monument given in the deed, that then the latter may be adopted as the true monument, or if the closing line, in conformity with its general description, can be run to and from that dock, the jury will be justified in adopting such direction of the line as the true one.

8. That the reference in the mortgage from John P. Ryers to R. Waler, to the devise of Gozen Ryers, adopted and made such devise the true description of the property conveyed, and if the premises in question are embraced in that devise, the mortgage is an assertion of a right to convey them by Jno. P. Ryers.

9. That if it is found that the will of Gozen Ryers, in the description of property derived from his wife, claims title to such property, the subsequent clause of the will is not to be regarded as retracting or qualifying such assertion of right, unless plainly consistent with the preceding clause, nor if its terms can be satisfied without rejecting such former clause.

10. That if the lessor proves a prior possession of the premises by those through whom he derives title, he will be entitled to recover by means of such prior possession, unless the defendants prove a bona fide adverse possession of 25 years, or a possession of less than that period under a paramount title.

11. That the deed to the lessor under the decree in chancery for the sale of the premises will operate, notwithstanding the adverse possession of the defendants at the time the deed was executed, if such possession was not bona fide in its inception, or if it was taken after the decree ordering the sale of the premises, and pending proceedings in execution of such decree, or if it was taken with knowledge of the proceedings in chancery and with the intent to defeat such proceedings.

12. That if it is found that the deed from John Simonson and wife, to Mersereau and Van Pelt, includes the premises in question, it is competent evidence of an assertion or setting up of the Corson title thereto, and will be available to the lessor to the extent of his interest under that title.

Which said points, upon which the disagreement has happened, are stated above, under the direction of the said court, pursuant to the prayer of the parties aforesaid, and ordered to be certified into the Supreme Court of the United States, at the next term thereof, pursuant to the act of Congress in such case made and provided.

FRED. J. BETTS, Clerk.

647.

SUPREME COURT OF THE UNITED STATES.

No. 59.

WILLIAM COVINGTON, PLAINTIFF IN ERROR,

vs.

DAVID A. COMSTOCK.

IN ERROR TO THE DISTRICT COURT U. S. FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

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DAVID A. COMSTOCK
vs.
WILLIAM COVINGTON. } 126.

Pleas had at a district court of the United States for the northern district of Mississippi, began and held at the town of Pontotoc, in said district, on the first Monday of June, in the year of our Lord one thousand eight hundred and thirty-nine—present the Hon. Samuel J. Gholson, Esquire, judge of said court:

Be it remembered, that on the 25th day of April, in the year of our Lord one thousand eight hundred and thirty-nine, David A. Comstock, who is a citizen of the State of New York, sued out of the office of the clerk of the district court of the United States, for the northern district of Mississippi, his certain summons, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Mississippi, ss:

The President of the United States to the Marshal of the Northern District of Mississippi, greeting:

We command you, without delay, to summon William Covington, who is a citizen of the northern district of Mississippi, that he be and appear before the district court of the United States to be held at the town of Pontotoc, in and for the northern district of Mississippi, on the first Monday of June next, to answer to David A. Comstock, who is a citizen of the State of New York, of a plea of trespass on the case upon promise, to the plaintiff's damage of ten thousand dollars, as 't is said, and that he do file his plea or defence with the clerk of said court, on or before the meeting of the same, or judgment will be given against him by default. And have you then and there this writ.

Witness, Samuel J. Gholson, Esquire, judge of said court, at Pontotoc, in said district, this 25th day of April, A. D. 1839, and of the Independence of the United States 63d.

G. M. RAGSDALE, *Clerk.*

Which summons is endorsed as follows, to wit: "This action of assumpsit is founded on a promissory note, made by the defendant to Nelson, Carleton & Co. (and by them endorsed to the plaintiff,) for $4,560 $\frac{04}{100}$, dated 2d March, A. D. 1836, and payable six months

after the date thereof. No bail required. Declaration filed at the issuing of this writ. Judgment will be required at the return term thereof.

TUCKER & BUTTERWORTH,
Atty's for Plaintiff.

Upon which said *said* summons the marshal made the following return, to wit:

" Came to hand 1st May, 1839.

A. G. WEIR, *Marshal.*
By his deputy, J. W. CARROLL.

Executed on the defendant, by delivering him a true copy in person. May 3d, 1839.

A. G. WEIR, *Marshal,*
By his deputy, J. W. CARROLL.

And the said plaintiff, by his attorney, filed, at the time of issuing said summons, his declaration, in the words and figures following, to wit:

NORTHERN DISTRICT OF MISSISSIPPI, *ss:*

District Court for the Northern District of Mississippi, of June term, A. D. 1839.

David A. Comstock, who is a citizen of the State of New York, who is endorsee of persons trading under style and firm of Nelson, Carleton & Co., who are also citizens of the State of New York, by attorney, complains of William Covington, who is a citizen of the northern district of Mississippi, in custody, &c., of a plea of trespass on the case, upon promise, &c. For that, whereas, the said defendant, heretofore, to wit: on the second day of March, A. D. 1836, at New York, to wit: in the district aforesaid, made a certain note in writing, commonly called a promissory note, bearing date the day and year last aforesaid, and then and there delivered the said note to Nelson, Carleton & Co., who are citizens of the State of New York; by which said note the said defendant promised, by the way and style of Covington & McMorris, to pay to the said Nelson, Carleton & Co. or order, forty-five hundred and sixty dollars and four cents, six months after the date thereof, for value received; and the said Nelson, Carleton & Co. then and there endorsed and delivered said note to the said plaintiff. By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note; and being so liable, the said defendant, in consideration thereof, afterwards, to wit: on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly to pay unto the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of said note. Nevertheless, the said defendant, altho' often requested, &c., to wit: on the

day when said note became due and payable, according to the tenor and effect thereof, and oftentimes since, to wit: at the place aforesaid, hath not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant hath hitherto altogether refused, and still doth refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore the said plaintiff brings suit, &c.

TUCKER & BUTTERWORTH,
Att'ys for Plaintiff.

And the said defendant by attorney, filed on the 10th day of June, in the year of our Lord one thousand eight hundred and thirty-nine, being a day of the June term of said court, his plea in the words and figures following, to wit:

DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

DAVID A. COMSTOCK
vs.
WILLIAM COVINGTON. } June Term, 1839.

And the said defendant, by his attorney, comes and defends the wrong and injury, and says, that he did not undertake in manner and form as the plaintiff hath heretofore alleged against him, and of this he puts himself upon the country.

YOUNG & BLEDSOE,
Attorneys for defendant.

And the said plaintiff, by attorney, joined issue in the wodrs following, to wit:

"And the plaintiff does the like."

TUCKER & BUTTERWORTH,
Plaintiff's Attorneys.

And afterwards, to wit: on the eleventh day of June, one thousand eight hundred and thirty-nine, being a day of the June term of said court, the following proceedings were had in the foregoing case, to wit:

DAVID A. COMSTOCK
vs.
WILLIAM COVINGTON. } 31. *Ass't.* $5,573 $\frac{38}{100}$.

Tuesday, June 11th, 1839

This day come the parties by their attorneys, and thereupon came a jury of good and lawful men, to wit: Jury No. 3., who being elected, tried and sworn, well and truly to try the issue joined, upon their oaths do say, they find for the plaintiff and assess his damages,

by non-performance of the promise in the declaration mentioned, to the sum of five thousand five hundred and seventy-three dollars and thirty-eight cents. It is therefore considered by the court that the plaintiff recover of the defendant the sum of five thousand five hundred and seventy-three dollars and 38 cents, the damages by the jury assessed, with the costs in this cause expended.

And the said defendant, by attorney, filed, before the jury retired from their box, his bill of exceptions in the words and figures following, to wit:

"THE UNITED STATES OF AMERICA."

District Court for the Northern District of Mississippi.

DAVID A. COMSTOCK }
vs.
WILLIAM COVINGTON. }

Be it remembered that the above cause came on to be tried on the eleventh day of June, A. D. 1839, before the Hon. Samuel J. Gholson, presiding judge for the district aforesaid, and the said plaintiff offered as evidence to the jury a promissory note in writing, of which the following is a true copy:

$4,560 04. New York, March 2nd, 1836.

Six months after date, we, the subscribers, of Columbus, State of Mississippi, promise to pay to the order of Nelson Carleton & Co., forty-five hundred sixty $\frac{04}{100}$ dollars at New York, for value received.

COVINGTON & McMORRIS.

To which promissory note as evidence, the defendant William Covington, by his attorney, objected, because the note so offered as evidence varied from the note as described in the declaration—in this the note offered in evidence was made payable at New York, and the note set forth in the declaration was made payable generally, which objection was overruled by the court, and this bill of exception to the opinion of the court was signed and sealed, and ordered to be made a part of the record in this cause before the jury retired from the box.

Given under my hand and seal, this 11th day of June, in the year 1839.

S. J. GHOLSON, [SEAL.]

UNITED STATES OF AMERICA, *Northern District of Mississippi.*

I, Gabriel M. Ragsdale, Clerk of the District Court of the United States for the northern district of Mississippi, do hereby certify, that the within and foregoing is a true, full and complete transcript of

the records and proceedings had in the foregoing cause in said district court, together with a true copy of the bond and power of attorney as filed in my office on the 19th day of June, A. D. 1839.

Given under my hand and the seal of said court at office
[SEAL.] in Pontotoc, this 28th day of November, in the year 1839.

G. M. RAGSDALE, *Clerk.*

I do hereby certify, that G. M. Ragsdale, whose name appears to the foregoing and within transcript of record, is, and was clerk of said court.

Given under my hand at Pontotoc, the 12th day of December, 1839.

S. J. GHOLSON.

[A Copy.]

THE STATE OF MISSISSIPPI, *Lowndes County.*

Know all men by these presents, that I, William Covington, do nominate and appoint Richard B. Covington, my attorney in fact for me and in my name, to execute a bond by affixing my name and seal, to one David A. Comstock, his heirs, executors and administrators, for the purpose of indemnifying and securing the payment of the costs and damages of a writ of error, prosecuted by me, to the Supreme Court of the United States, to reverse the judgment rendered in the district court for the northern district of Mississippi, in which case, I, the said William Covington am plaintiff in error, and the said David A. Comstock is defendant in error. The said Richard B. Covington is hereby empowered and authorised by me to comply strictly with the requisitions of the law, in binding my heirs, executors and administrators to the said David A. Comstock, his executors, administrators and heirs, well and truly to pay all costs and damages, provided I, the said William Covington, fail to prosecute said writ of error with effect.

In testimony whereof, I hereunto affix my hand and seal, this 15th day of June, A. D. 1839.

WM. COVINGTON, [SEAL.]

THE STATE OF MISSISSIPPI, *Lowndes County.*

Personally appeared before me, Thomas B. Winston, notary public in and for the county aforesaid, William Covington, who acknowledged the foregoing instrument to be his proper act and deed for the purposes therein mentioned.

In testimony whereof, I hereunto set my hand and
[SEAL.] seal of office, this 15th day of June, A. D. 1839.

THOMAS B. WINSTON,
Notary Public.

UNITED STATES OF AMERICA,
Northern District of Mississippi.

Know all men by these presents, that we, William Covington, Samuel L. Watt and Charles W. Martin are held and firmly bound unto David A. Comstock, in the just and full sum of six thousand dollars, lawful money of the United States, to be paid to the said David A. Comstock or his lawful attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the 18th day of June, A. D. one thousand eight hundred and thirty-nine. The condition of the above obligation is such, that whereas at a term of a district court of the United States for the northern district of Mississippi, commenced and held at the town of Pontotoc, on the first Monday of June, A. D. 1839, judgment was rendered by said court in favor of the said David A. Comstock against the said William Covington, for the sum of five thousand five hundred and seventy-three dollars and thirty-eight cents, and cost of suit. And the said William Covington hath sued out a writ of error from the Supreme Court of the United States to reverse said judgment. Now, if the said William Covington shall prosecute his said writ of error to effect, and shall well and truly pay and satisfy the amount of said judgment, and all such damages, interests and costs as the said Supreme Court of the United States shall adjudge in the premises, if the said William Covington shall fail to make his plea good, then in that case this obligation to be void, otherwise to remain in full force and virtue.

WILLIAM COVINGTON, [L. S.]
By R. B. COVINGTON, *Att'y in fact.*
SAM. S. WATT. [L. S.]
C. W. MARTIN. [L. S.]

Sealed and delivered in presence of
THOMAS GHOLSON.

I approve of the above bond and security, June 19th, 1839.
S. J. GHOLSON,
Judge of the United States District Court for the District of Mississippi.

UNITED STATES OF AMERICA, *ss:*

To David A. Comstock, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be holden at Washington, on the second Monday in January next, pursuant to a writ of error, filed in the clerk's office of the court for the trial of impeachments and the correction of errors, of the district court of the United States for the northern district of Mississippi, wherein William Covington is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error

mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel J. Gholson, judge of the United States court for the northern district of Mississippi, this 27th day of August, 1839.

S. J. GHOLSON.

The within process was duly served this day by showing the same to the within named David A. Comstock, and at the same time personally delivering to him a true copy thereof.

Dated October 3, 1839.

WM. COVENTRY H. WADDELL,
U. S. Marshal for the Southern District of New York.
S. RAPAYLE, *Dep.*

SOUTHERN DISTRICT OF NEW YORK, *ss*:

Silvanus Rapayle having been duly sworn, doth depose and say, that he is the general deputy of the marshal of the United States for the southern district of New York; that on the third day of October, 1839, this deponent served the annexed process, by showing the same to the within mentioned David A. Comstock, and at the same time delivering to him a true copy thereof—and further deponent saith not.

SILVANUS RAPALYE.

Sworn to before me the 3d day of October, 1839.

GEO. W. MORTON,
U. S. Comm'r.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, Frederick J. Betts, clerk of the circuit court of the United States for the southern district of New York, do hereby certify that Silvanus Rapalye, whose name, in his own proper handwriting, is subscribed to the annexed deposition, was, at the time of signing the same, the general deputy of the marshal of the United States for the southern district of New York, and that George W. Morton, whose name is subscribed to the citation, is a commissioner duly appointed by the said circuit court.

In testimony whereof, I have hereto subscribed my name, and affixed the seal of the circuit court, this third day of October, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-fourth.

[L. S.]

FRED. J. BETTS, *Clerk.*

652.

SUPREME COURT OF THE UNITED STATES.

No. 60.

GUY C. IRVINE, FOR THE USE OF THE LUMBERMEN'S BANK AT WARREN, PLAINTIFF,

vs.

NATHANIEL A. LOURY.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U S. FOR WEST PENNSYLVANIA.

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Langtree & O'Sullivan, Print.—1840.

IN THE CIRCUIT COURT OF THE UNITED STATES,
For the Western District of Pennsylvania.

No. 18, of November Term, 1839.

(Biddle,) (McCandless.) (Forward.)	GUY C. IRVINE, for the use of the Lumbermen's Bank, at Warren, *vs.* NATHANIEL A. LOWRY.	Foreign attachment in case.—Bail in $80,000.

Record in this case certified from the court of common pleas, of the county of Warren, filed.

1839, Nov. 18th. On motion of Mr. Biddle—rule to show cause during the term, why this cause should not be remanded to the court of common pleas of Warren county.

1839, Dec'r 4th, 5th, and 6th. Motion to show cause, argued by Mr. McCandless for the motion, and by Mr. Forward, contra.

1839, Dec'r 6th. Cause divided, and case certified to Supreme Court.

Among the rolls, records, and judicial proceedings of the court of common pleas for the county of Warren, in the Commonwealth of Pennsylvania, remaining in the office of the prothonotary of the said court, the following words and figures are to be found, to wit:

(*Prescisse.*)

GUY C. IRVINE, for the use of the Lumbermen's Bank at Warren, *vs.* NATHANIEL A. LOWRY.	Issue foreign attachment in case: bail in $80,000.

STRUTHERS & JOHNSTON,
Atty's for pl'ff.

W. W. Hodges, Esq., Pro., entered on the back.

No. 54, June Term, 1839. Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, *vs.* Nathaniel A. Lowrie, prec'ss, foreign attach., in case filed, iss'd and en., May 6, 1839.

(*Writ.*)

Foreign Attachment.

WARREN COUNTY, *ss.*

The Commonwealth of Pennsylvania, to the sheriff of said county send greeting. We command you that you attach Nathaniel A. Loury, lat of your county, by all and singular his goods and chattels, lands an

tenements, in whose hands or possession soever the may be, so that he be and appear before our court of common pleas, to be holden at Warren, in and for said county, on the first Monday of June next, then to answer Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, of a plea of trespass on the case; and, also, that you summon all persons in whose hands or possession the said goods and chattels, or any of them, may be attached, so that they, and every of them, be and appear before the said court at the day and place mentioned in this writ, to answer what shall be objected against them, and abide the judgment of the court therein; and have you then there this writ.

Witness the Hon. Isaac Connely and Abid Edson, judges of the said court, the sixth day of May, A. D. 1839.

W. W. HODGES, Proth'y.

Endorsed on the back.

No. 54, June Term, 1839. Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, *vs.* Nathaniel A. Lowry—foreign attachment—bail in $80,000.

(STRUTHERS & JOHNSTON, Atty.)

Sheriff's Return.

May 18th, 1839. By virtue of the foregoing writ, I have attached, among other things, the following real estate, as the property of N. A. Lowry, viz:

In the township of	Sheffield,	lot No.	317,	containing	223 ac.
"	"	"	318,	"	225
"	"	"	327,	"	225
"	"	"	209,	"	225
" Elk Part of	"	"	5529,	"	100
" "	"	"	5535,	"	100
" Pleasant		"	638,	"	165
" "		"	519,	"	165
" Kingua		"	498,	"	165
" "		"	38,	"	225
" "		"	39,	"	225

Also 400 acres and 12 perches in Durfield township, surveyed Sept. 26th, 1836, upon warrant granted to R. Falconer, dated Aug. 4th, 1836. And 326 acres 84 perches, in Durfield township, surveyed Sept. 26th, 1836, upon warrant granted to N. A. Lowry, dated Aug. 4, 1836. Also all his, N. A. Lowry's, right, title, interest, of, in and to a certain tract of 1099 acres and 34 perches, in Pine Grove township, conveyed to said Lowry and Guy C. Irvine by Clement S. Miller, as trustee, by deed bearing date 18th October, 1837. So answers

J. C. GORDON, Sheriff.

Served on] Guy C. Irvine, Josiah Hall, Jesse B. Phillips, Carter V. Kinmar, Nathan Whitney, Archibald Tanner, William Giggins, and Walter W. Hodges, Proth'y, attaching all and singular, the goods and chattles, rights and credits of the said Nathaniel A. Loury, in their hands, and summoned the said Guy C. Irivne, Josiah Hall, Jesse B. Phillips, Carter V. Kinmar, N. Whitney, Archibald Tanner, William Giggins and Walter W. Hodges, Proth'y, as garnishes.

Defendant's Petition.

To the honorable the court of common pleas, now holding in and for the county of Warren, the petition of Nathaniel A. Loury, a resident and citizen of the State of New York, humbly showeth:

That heretofore, to wit, on the sixth day of May last past, a certain writ of foreign attachment, in case issued out of the court of common pleas of Warren county, in the State of Pennsylvania, in the name of Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, against your petitioner, to wit: No. 54, of June term, in the year of our Lord one thousand eight hundred and thirty-nine, in which the plaintiff claims to the amount of more than five hundred dollars. That your petitioner is, and was at the time of the commencement of the said action, and during the whole time since the commencement thereof, has been a citizen and resident of the State of New York, and that the said Guy C. Irvine is, and was at the time of the commencement of the said suit and during the whole time aforesaid, a citizen of the State of Pennsylvania. That not having yet entered his appearance to the said action, and being desirous so to do, and to remove the said cause to the circuit court of the United States for the western district of Pennsylvania:

Your petitioner further showeth, that he is ready and offers good and sufficient surety for his entering in the said circuit court of the United States, on the first day of its next session hereafter, copies of the said process against him, and also, for his then appearing, and in all things complying with the acts of Congress in such cases made and provided.

Your petitioner therefore prays your honorable court to accept of his surety, and proceed no further in the said cause. And your petitioner further prays for the removal of the said cause to the said circuit court for the western district of Pennsylvania, agreeably to the provisions of the acts of Congress in such cases made and provided.

And your petitioner will ever pray, &c.

N. A. LOURY.

WARREN COUNTY, *ss.*

N. A. Loury, the foregoing petitioner, being duly sworn according to law, deposeth and saith, that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

N. A, LOURY.

Sworn and subscribed the 24th day of Oct., A. D. 1839.

W. W. HODGES, Proth'y.

Endorsed on the back.

No. 54, June term, 1839. Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, *vs.* Nathaniel A. Loury. Petition for removal of cause to circuit court, filed and en. Oct. 24th, 1839, and the prayer of the petitioner granted by the court.

W. W. HODGES, Proth'y.

(*Bond.*)

GUY C. IRVINE, for the use of the Lumbermen's Bank at Warren, *vs.* NATHANIEL A. LOURY. } In the court of common pleas of Warren county, No. 54, June term, 1839, foreign attachment in case. Bail in $80,000.

Know all men by these presents, that we, Nathaniel A. Loury and Andrew Irvine, are held and firmly bound unto the above named Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, in the sum of two thousand dollars, to be paid to the said Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, his executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents; sealed with our seals, and dated the twenty-fourth day of October, one thousand eight hundred and thirty-nine.

Whereas, the above named Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, hath sent out a certain writ of foreign attachment in the court of common pleas of Warren county, against the above-named Nathaniel A. Loury, in which the sum in controversy exceeds the sum of five hundred dollars; and whereas, the said Nathaniel A. Loury has preferred his petition for the removal of the said cause to the circuit court of the United States for the western district of Pennsylvania, setting forth, that he is now, and was at the commencement of the said suit a citizen of the State of New York, and the plaintiff, a citizen of the State of Pennsylvania.

Now, therefore, the condition of this obligation is such, that if the above-named Nathaniel A. Loury shall, and do well enter in the said circuit court of the United States, on the first day of its next session, copies of the said process against him, and then and there appear and generally comply with all things required by the act of Congress in such cases made and provided, then this obligation to be void, otherwise be and remain in full force and virtue.

N. A. LOURY, [SEAL.]
ANDREW IRVINE. [SEAL.]

Signed sealed and delivered in the presence of
JOHN GALBRAITH,
BENJ. BARTHOLOMEW

Endorsed on the back.

G. C. Irvine, for the use of the Lumbermen's Bank at Warren, *vs.* N. A. Loury. Bond, 24th Oct., 1839. The within bond ordered to be filed by the court.

A. McC.

The surety in the within bond approved and accepted by the court, 24th Oct., 1839.

Filed and en., Oct. 24th, 1839.

Affidavit of Robert Falconer.

GUY C. IRVINE, for the use of the Lumbermen's Bank at Warren, *vs.* NATHANIEL A. LOURY.	In the court of common pleas of Warren county, No. 54, June term, A. D. 1839. Foreign attachment. Bail in $80,000.

WARREN COUNTY, *ss.*

Robert Falconer, being duly sworn according to law, *according to law*, saith, that he was president of the Lumbermen's Bank at Warren, at the date of the note or instrument of writing on which the above suit is founded, that the same was received by the bank from the defendant at time it bears date, as a security for his previous indebtedness to the said institution, and that Guy C. Irvine had not then or any time since any interest in the said note or instrument of writing, except as a guarantor for the payment of the same, and the solvency and sufficiency of the drawer of the same.

ROBERT FALCONER.

Sworn and subscribed in open court before me,

W. W. HODGES, Proth'y.

(Endorsed on the back.)

No. 54, June term, 1839. G. C. Irvine, for use *vs.* N. A. Lowry. Affidavit of R. Falconer, filed & en. Oct. 24, 1839.

(Affidavit of Walter W. Hodges.)

GUY C. IRVINE, for use of the Lumbermen's Bank at Warren, *vs.* NATHANIEL A. LOWRY.	In Warren, Common Pleas, No. 54, June Term, 1839. Issued May 6th, 1839. Foreign Attachment in case, bail in $80,000.

Walter W. Hodges being duly sworn, doth depose and say, that William Hall, Vine Elderkin, Brown and Buckland, Starkweather and Brown, and sundry other persons, were stockholders in the Lumbermen's

Bank at Warren, at the time of the bringing of the above entitled suit, and were citizens of the State of New York, and that they are still stockholders of said bank, as appears from the books of the same, and that the said stockholders still reside in, and are citizens of the State of New York, as this deponent verily believes.

WALTER W. HODGES.

Sworn and subscribed before me, Oct. 24, 1839.

GILMAN MERRILL, J. P.

(Endorsed on the back.)

Guy C. Irvine, for the use of the Lum. B'k at Warren, *vs.* N. A. Lowry. Affidavit filed and en. Oct. 24, 1839.

(Plaintiff's objections.)

GUY C. IRVINE, for the use of the Lumbermen's Bank at Warren, *vs.* NATHANIEL A. LOWRY. } No. 54. June Term, 1839. Application by Deft. to remove this case to the Circuit Court of the U. S.

The plaintiff objects to this court taking jurisdiction of this question, or any other question respecting this suit, it being for the same cause of action which was sued in a former action, in which the president of this court was attorney and counsel for the defendant.

(Endorsed on the back.)

No. 54, June term, 1839. G. C. Irvine for use *vs.* N. A. Lowry. Plff.'s objections, filed and en. Oct. 24, 1839.

(Order of the Court.)

GUY C. IRVINE, for the use of the Lumbermen's Bank at Warren, *vs.* NATHANIEL A. LOWRY, } In Warren County Common Pleas. Foreign Attachment in case. No. 54, June Term, 1839.

And now to wit: October 24th, 1839, upon reading and filing the petition of defendant, duly sworn, shewing that the petitioner is a citizen and resident of the State of New York, and that the plaintiff is a citizen of Pennsylvania, and that the sum in controversy exceeds five hundred dollars.

And also upon reading and filing the bond of defendant and his surety.

Upon motion of Mr. Galbraith, counsel for defendant, made at the time of deft's first appearing to the above suit, after hearing Messrs. Hazeltine and Strothers for plaintiff, approving the motion:

It appearing to the satisfaction of this court that the amount in controversy exceed five hundred dollars, admitted by the plaintiff's counsel:

It is ordered that the security offered by defendant be accepted, and that this cause be removed to the circuit court of the United States for the western district of Pennsylvania.

(By the Court. Endorsed on the back.)

No. 54, June term, 1839. Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, vs. N. A. Lowry. Order of the court, filed and en. Oct. 25th, 1839.

(Docket entries.)

ST. & JOHNSTON, GUY C. IRVINE, for the use of the Lumbermen's Bank at Warren, *vs.* NATHANIEL A. LOWRY.	No. 54, June Term, 1839. Issued May 6th, 1839. Foreign attachment in case, bail $80,000.

Tax charged S. & J. - - - - $50

SHERIFF GORDON.

Attached the defendant by his lands as per schedule annexed, and served on Guy C. Irvine, Josiah Hall, J. B. Phillips, C. V. Kinnear, N. Whitney, A. Tanner, Wm. Giggins, and W. W. Hodges, Pro., attaching all, and singular the goods and chattels, rights and credits of the def't in their hands, and summoned them as garnishes. So answers, &c.

June 4, 1839. On motion the court directed a publicatiou of this writ in the Jamestown Journal.

October 24, 1839. Petition of the defendant to remove this cause to the circuit court of the western district of Pennsylvania, filed, and the prayer of the petitioner granted by the court.

October 24, 1839. The court order the bond of the defendant and Andrew Irvine, in the sum of two thousand dollars, approved and accepted by the court, to be filed.

October 24, 1839. Affidavit of Robert Falconer and Walter W. Hodges, filed.

October 24, 1839. Plaintiff's objections to the jurisdiction of the court in the question of the removal of this cause to the circuit court of the United States, filed.

October 25, 1839. Order of the court filed.

PENNSYLVANIA, Warren county, *ss.*

I, Walter W. Hodges, prothonotary of the court of common pleas, in and for the said county, do hereby certify that the within foregoing is a full, entire, and exemplified copy of the whole record and papers on file

in the suit, wherein Guy C. Irvine, for the use of the Lumbermen's Bank at Warren, is plaintiff, and Nathaniel A. Lowry defendant, in the court of common pleas, in said county of Warren, remaining in the office of the prothonotary of the same court. In testimony whereof I have hereunto set my hand and affixed the seal of the said court at Warren, the twenty-sixth day of October, A. D. 1839.

WALTER W. HODGES, Proth'y.

PENNSYLVANIA, Warren county, *ss*.

I, Alexander McCalment, president judge of the eighteenth judicial district, composed of the counties of Warren, Jefferson, McKean, and Potter, in the State of Pennsylvania, do hereby certify that the above certificate and attestation is in due form of law, and that Walter W. Hodges, who subscribed the same, is the prothonotary of the court of common pleas in and for the county of Warren, and the seal thereto affixed is the seal of the said court; also, that the said Walter W. Hodges is duly commissioned and qualified to act as the prothonotary aforesaid, and is the proper officer for attesting the same. In testimony whereof I have hereunto set my hand and seal, at Warren, this 26th day of October, A. D. 1839.

A. McCALMONT, [L. S.]

PENNSYLVANIA, Warren county, *ss*.

[SEAL.] I, Walter W. Hodges, prothonotary of the court of common pleas in and for said county, do hereby certify that Alexander McCalmont, Esquire, who appears to have made the within certificate to which his name is subscribed, was at the date thereof, and is now, president judge of the eighteenth judicial district, composed of the counties of Warren, Jefferson, McKean, and Potter, duly commissioned and sworn, and is the proper officer to make the same, and that the signature of "A. McCalmont" subscribed thereto, purporting to be his, is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Warren, this twenty-sixth day of October, A. D. 1839.

Walter W. HODGES, Prothonotary.

(Endorsed on the back) U. S. Circuit Court.

No. 18, of November term, 1839. Guy C. Irvine, for use of the Lumbermen's Bank at Warren, *vs*. Nath. A. Lowry. This copy of the record substituted in place of the original record, December 5th, 1839.

(Copy of the rule.)

In the Circuit Court of the United States for the Western District of Pennsylvania in the third district.

No. 18, of November session, 1839.

(Biddle.)	GUY C. IRVINE, for the use of the Lumbermen's Bank at Warren, *vs.*	Foreign Attachment.
(Forward.)	NATHANIEL A. LOWRY.	

And now to wit: November 18, 1839. On motion of Mr. Biddle, rule to show cause during the term why this cause should not be remanded to to the court of common pleas of Warren county.

(Copy.) From the records.

E. J. ROBERTS, *Clerk.* [SEAL.]

(Endorsed on the back.)

No. 18, November session, 1839. George C. Irvine *vs.* N. A. Lowry, rule to show cause, served by copy; so answers A. Plumer (Biddle.)

UNITED STATES, *Western District of Pennsylvania, ss:*

I, Edward J. Roberts, clerk of the circuit court of the United States for the Western district of Pennsylvania, do hereby certify that the foregoing contains a true and faithful copy of the record in the case of Guy C. Irvine, for use of the Lumbermen's Bank at Warren, *vs.* Nathaniel A. Lowry, and of all the papers remaining on file in the office of the clerk of the circuit court of the United States for the said district.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court at the city of Pittsburgh, this 6th day of January, A. D. 1840, and of the independence of the United States, the sixty-fourth.

E. J. ROBERTS, *Clerk.*

GUY C. IRWIN, for use of the Lumbermen's Bank at Warren, *vs.* N. A. LOWRY.	In circuit court of the United States for the western district of Pennsylvania.

And now, to wit, Dec. 4th, 5th, and 6th, 1839, the rule granted 15th Nov., '39, to show cause why the record in this case should not be remanded to the court of common pleas of Warren county, Pennsylvania, being before this court for a hearing, Mr. McCandless, the counsel for the Lumbermen's Bank at Warren, produced to the court an act of assembly of the Commonwealth of Pennsylvania, passed the 28th day of February, 1834, (Pamphlet Laws of 1833–34, page 96,) for chartering the Lumbermen's Bank at Warren. Also, an act of assembly of said common-

wealth, entitled, an act, &c., passed by both houses of the Legislature, the 21st Mar. 1813, and being returned by the Governor with objections, was passed by two-thirds of both houses on 21st March, 1814, (Smith's aws, vol. 6, page 164,) also an act of assembly of said com'th, passed 25th March, 1824, entitled, an act to recharter certain banks. It was admitted by the counsel of the defendant that the Lumbermen's Bank at Warren had been duly chartered and organized pursuant to the act of the 28th Feb'ry, 1834, and did commence the business of banking at Warren, Penn. The counsel for the Lumbermen's Bank produces to the court an instrument of writing in the words and figures following, to wit:

"WARREN, PA. Sept. 6, '37.

"$53,000.

"Three months after date I promise to pay to the order of Guy C. Irwin, Esq., fifty-three thousand dollars, in the office notes of the Lumbermens' Bank at Warren, and payable at their banking house in Warren, Pa."

[N. A. LOWREY.]

Also, an agreement of said Lowrey appended to said note in the following words:—"The erasure to have no effect, and the note to remain with the same force as before erasure, and no other.

N. A. LOWREY."

Endorsed on side—Guy C. Irwin.

The counsel for said bank states, and the def'ts counsel admits, that this suit is founded upon the instrument of writing above mentioned.

It is admitted by the counsel for the pl'ffs, that Guy C. Irwin, the promissee in said note, is, and was, at the date of the said note, and at the date of the institution of this suit, a citizen of the State of Penna., and that N. A. Lowrey, the defendant in this suit, is, and was, at the date of the institution thereof, a citizen of the State of New York, and it appeared from the record that a part of the stockholders of said bank were, at the date of the institution of this suit, citizens of the State of New York. The counsel of defendant, on his part, produces to the court an act of assembly of the com'th of Pennsylvania, passed the 13th June, '36, entitled, "an act relating to the commencement of actions," also, a joint resolution of the Senate and House of Pepresentatives of said com'th, approved by the Governor on the 24th June, '39, requiring said bank to resume specie payments by the first Monday of September, 1839, &c.

Whereupon, it appearing to the court that this suit is founded on the note aforesaid, dated 6th Sept., 1837; that Guy C. Irwin was, at the date of the institution of this suit, a citizen of Penna., and that N. A. Lowrie was, at the same date, a citizen of the State of New York; that said bank was erected and duly organized at Warren, in Penna., under the act of Feb'ry 28th, 1834, aforesaid, and that six persons mentioned in the record, and sundry other stockholders thereof, were, at the date of

said suit, citizens of the State of New York. And due consideration being had of the premises, the court are divided in opinion. One of the judges thereof, being of opinion that this court has no jurisdiction of the case; that the rule, granted as aforesaid, be made absolute, and the record of this suit remanded to the court of common pleas of the county of Warren. The other judge being of opinion, that this court has jurisdiction of the case, and that the rule granted as aforesaid be denied.

We, the undersigned judges of the circuit court, do certify that on the hearing of the parties above referred to, the judges were opposed in opinion. Witness our hands and seals.

[SEAL.]
TH. IRWIN, [SEAL.]

UNITED STATES,
Western District of Pennsylvania, ss.

I, Edward J. Roberts, clerk of the circuit court of the United [SEAL.] States for the western district of Pennsylvania, do hereby certify, that the foregoing is the original paper filed of record in open court, in the case of G. C. Irwin, for use, *vs.* Nath. A. Lowrey. In testimony whereof, I have hereunto set my hand and affixed the seal of the said court this 8th day of January, A. D., 1840, and of the independence of the United States, the sixty-fourth.

E. J. ROBERTS, Clerk.

659.

SUPREME COURT OF THE UNITED STATES.

No. 61.

HENRY A. SUYDAM AND WILLIAM BOYD, PLAINTIFFS,

vs.

ROBERT BRODNAX AND ISAAC NEWTON, ADMINISTRATORS OF DAVID NEWTON, DECEASED.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. SOUTHERN DISTRICT OF ALABAMA.

Pleas had before the honorable the circuit court of the United States for the ninth judicial circuit, and southern district of Alabama, at a term thereof begun and held in and for said district, at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and thirty-eight, before their honors John McKinley, presiding judge, and William Crawford, judge of said court. Be it remembered, that heretofore, to wit, on the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and thirty-seven, Henry A. Suydam and William Boyd, suid out of said court their writ of capias ad respondendum against Robert Brodnax and Isaac Newton, in the words and figures following, to wit:

UNITED STATES OF AMERICA,

Circuit Court of the United States for the Ninth Judicial Circuit, Southern District of Alabama.

SUYDAM and BOYD *vs.* BRODNAX and NEWTON. } 477.

The President of the United States to the Marshal of said District, greeting:

You are hereby commanded to take the bodies of Robert Brodnax and Isaac Newton, administrators of David Newton, deceased, who are citizens of the State of Alabama, and them safely keep, so that you have them before the honorable the circuit court aforesaid, at the place of hold-

ing said court, at Mobile, on the second Monday of April next, to answer unto Henry A. Suydam and William Boyd, partners, trading under the firm and style of Suydam & Boyd, who are citizens of the State of New York, in a plea of trespass on the case, to their their damage three thousand dollars; herein fail not, and have you then and true this writ.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, and the seal of said circuit court, this 29th day of March, in the year of our Lord one thousand eight hundred and thirty-seven.

[SEAL.] Issued the 29th day of March, in the year of our Lord one thousand eight hundred and thirty-nine.

Attest: DAVID FILES, Clk. So. Dist. Ala.

We acknowledge ourselves security for costs at the instance of the plaintiffs in the above suit.

GORDON, CAMPBELL & CHANDLER.

This action is founded on a note given by David Newton, deceased, to plaintiffs for $1,098 14, dated New York, September 1st, 1835, at 12 months.

GORDON, CAMPBELL & CHANDLER, Plff's Attys.

Received 29th March, and served 30th March 1837, on Brodnax, Newton not found.

R. L. CRAWFORD, U. S. Marshal,
By A. BROOKS, D. M.

And afterwards, to wit, at a term of the circuit court of the United States for the ninth judicial circuit and southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and thirty-seven, the plaintiffs filed the following declaration, to wit:

Declaration.

UNITED STATES OF AMERICA,
Circuit Court of the United States for the Ninth Judicial Circuit, Southern District of Alabama.

April Term, 1837.

Henry A. Suydam and William Boyd, partners under the firm of Suydam & Boyd, who are citizens of the State of New York, by attorney, complain of Robert Brodnax and Isaac Newton, administrators of David Newton, deceased, who are citizens of the State of Alabama, in custody, &c., of a plea of trespass on the case, &c. For that, whereas, the said David Newton, in his lifetime, heretofore, to wit, on the 1st day of September, 1835, at New York, to wit, in the district aforesaid, made his certain promissory note in writing, bearing date the day and year aforesaid, and then and there twelve months after the date thereof, promised to pay to the order of the said plaintiffs one thousand and ninety-

eight $\frac{14}{100}$ dollars for value received, and then and there delivered the said promissory note to the said plaintiffs. By means whereof, and by force of the statute in such case made and provided, the said David Newton, in his lifetime, became liable to pay to the said plaintiffs the said sum in the said promissory note specified, according to the tenor and effect thereof; and being so liable, he, the said David Newton, in his lifetime, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said plaintiffs to pay them the said sum of money in the said promissory note specified, according to the tenor and effect thereof. Yet the said David Newton, in his lifetime, and the said defendants as administrators since his death, though often requested, have not paid the said plaintiffs the said sum of money in the said promissory note specified, or any part thereof; but the same to pay have hitherto wholly neglected and refused, and the said defendants, as administrators as aforesaid, still do neglect and refuse, to the damage of the said plaintiffs of three thousand dollars; wherefore they sue.

GORDON, CAMPBELL & CHANDLER, Plffs Attys.

And afterwards, to wit, at a term of the circuit court of the United States for the ninth judicial circuit, and southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of April, in the year of our Lord one thousand eight hundred and thirty-eight, before their honors, John McKinley, presiding judge, and William Crawford, judge of said court, the following proceedings were had, to wit:

CIRCUIT COURT OF THE UNITED STATES,
For the 9th Judicial Circuit, and Southern District of Alabama.

SUYDAM & BOYD
vs.
BRODNAX & NEWTON,
Adm'rs of NEWTON.

In this cause the judges of the said court were opposed in opinion on the following questions which arose in the said cause, viz:

1st. Is the plea that the estate of the said decedent is insolvent sufficient in law to abate the said action?

2d. If the said plea be sufficient in law to abate said action, can the circuit court of the United States for the district aforesaid, refer said cause for adjudication and final settlement to a board of commissioners, to be appointed by a county court in one of the counties in the State of Alabama, in pursuance of an act of the Legislature of the said State?

Whereupon, it is ordered by the court, that it be certified to the Supreme Court of the United States, that the judges of said court are opposed in opinion, on the foregoing questions arising in the said cause; and it is further ordered that the said cause be continued.

I, David Files, clerk of the circuit court of the United States for the ninth judicial circuit and southern district of Alabama, do hereby certify, that the above and beforegoing two pages contain a full, true, and perfect exemplification of the record and proceedings, in a certain suit lately and still pending before said court, wherein Suydam & Boyd were plaintiffs, and Brodnax and Isaac Newton, administrators, etc., were defendants.

In testimony whereof, at office in the city of Mobile, I have hereunto set my hand, and affixed the seal of said circuit court, this twenty-ninth day of May, in the year of our Lord one thousand eight hundred and thirty-nine.

[SEAL.]

DAVID FILES, Clk. Cir. Ct. So. Dis. Ala.

661.

SUPREME COURT OF THE UNITED STATES.

No. 62.

JOHN S. MITCHELL, EX. AND DEVISEE OF ANDREW MITCHELL, DEC., PLAINTIFF IN ERROR,

vs.

ROBT. LENOX, JOHN JOHNSON AND JAS. S. TAYLOR, EXECUTORS OF JOHN TAYLOR, DEC., AND JOHN DAY, ET AL.

IN ERROR TO THE COURT FOR THE CORRECTION OF ERRORS.

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Langtree & O'Sullivan, Print.

At a court of chancery held for the State of New York, at the city of Albany, on the fifth day of March, one thousand eight hundred and thirty-nine.

Present: REUBEN H. WALWORTH, *Chancellor.*

JOHN S. MITCHELL, executor of the last will and testament, and devisee of ANDREW MITCHELL, deceased,

vs.

ROBERT LENOX, and JOHN JOHNSTON, and JAMES S. TAYLOR, executors of the last will and testament of JOHN TAYLOR, deceased, and JOHN DAY, impleaded with SIMON WALKER, JAMES GREENWAY, THOMAS COLEMAN, ROBERT COLEMAN, and the persons composing the several firms of NIVEN GALBREATH and COMPANY, J. L. PHILLIPS and BROTHERS, RHOADES and BRIGGS, KNUCKEL and RUYS, BROWN, SHARPS and COMPANY, JOSEPH LYON and COMPANY, BOWERBANK, MONKHOUSE and COMPANY, and CLEGG and PERKHOUSE, SUSAN MITCHELL, ANN MITCHELL, CORNELIA MITCHELL, ELIZA MITCHELL, and GEORGE MITCHELL.

On reading the remittitur in this cause from the Court for the Correction of Errors, in which court the complainant was appellant, and the four first named defendants were respondents, from which it appears that the said Court for the Correction of Errors did order, adjudge and decree that the decree of this court, appealed from by said appellant, be in all things affirmed; and that the respondents recover against the appellant their costs in defending said appeal, to be taxed, to be paid out of the estate of said appellant's testator, and that the said proceedings be remitted to this court.

Thereupon, on motion of Mr. Rhoades, of counsel for said respondents, it is ordered that said remittitur be filed in the office of the register of this court, that said decree of said Court for the Correction of Errors be, and the same is hereby made a decree of this court; and it is further ordered, that said complainant pay to said defendants, who were respondents in said Court for the Correction of Errors, their costs consequent upon said appeal, to be taxed out of the estate of his testator, Andrew Mitchell, and that said defendants have execution therefor, according to the course of practice of this court.

I, Hiram Walworth, the assistant register of the court of chancery of the State of New York, certify that the annexed transcript contains a true copy of the record in the cause, as a return to the annexed writ of error.

In witness whereof I have hereunto affixed the seal of the court of chancery at the city of New York, this eleventh day [L. S.] of January, eighteen hundred and forty, and of the independence of the United States the sixty-fourth.

HIRAM WALWORTH, *Assistant Register.*

In the Court for the Correction of Errors,

Between JOHN S. MITCHELL, executor of the last will and testament, and devisee of Andrew Mitchell, deceased, appellant,

and

ROBERT LENOX, and JOHN JOHNSON, and JAMES S. TAYLOR, executors of the last will and testament of John Taylor, deceased, and JOHN DAY, respondents,

(who, together with Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, Susan Mitchell, Ann Mitchell, Cornelia Mitchell, Eliza Mitchell, and George Mitchell, are defendants.)

To the Honorable the President of the Senate, the Senators and Judges of the Supreme Court of the State of New York, in the Court for the Correction of Errors:

The petition of appeal of the above-named appellant respectfully showeth:

That on the thirtieth day of December, one thousand eight hundred and thirty-five, the Court for the Correction of Errors made a decree in the cause then pending, between Andrew Mitchell, (now deceased,) and the present respondents, (except John Day,) and the defendants, affirming a decree made by the Chancellor, dismissing complainant's bill, without prejudice, &c. That, in comformity with this decree, the said Andrew Mitchell, deceased, filed a new bill before the Chancellor, on the twenty-fifth day of January, one thousand eight hundred and thirty-six, against the same parties as in the former bill, and John Day, the survivor of the second trustees. That both bills claim an account of the same estate.

That Robert Lenox, John Johnston, and James S. Taylor, executors, &c. of John Taylor, deceased, put in answers, setting up in substance the same defence as in the former answers, to which replications were filed. John Day has also put in his answer, and the bill has been taken as confessed by the creditors of Andrew Mitchell, deceased, none of them having appeared.

That the said Andrew Mitchell departed this life on the twenty-ninth day of May, one thousand eight hundred and thirty-six, having appointed your petitioner his executor, and the cause was revived by an order of the court of chancery.

That no testimony whatever has been produced on the part of the respondents, but they have submitted papers to the Chancellor without proving them. That this cause having been submitted, the Chan-

cellor, on the fourth day of September instant, made a decree dismissing the bill of complaint, with costs, to be paid out of the estate of your petitioner's testator.

And your petitioner being advised that the said decree, and every part thereof, is erroneous, he appeals from the same to this honorable court.

And your petitioner prays, that a short day may be appointed for the respondents to answer all and singular the premises before your honors; and that the said decree made by the Chancellor may be reversed, with costs; and that a decree may be made, that the respondents, Robert Lenox and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, after paying the amount due to the creditors who are defendants, pay to your petitioners the residue of so much money as will be equivalent to the value of the property of your petitioner's testator, converted by Robert Lenox, and John Taylor, deceased, to their own use, and unaccounted for, with interest; that the second assignment and the records thereof may be cancelled, and the real estate of your petitioner's testator conveyed to his devisees, according to their rights and interests under his last will; and that such other relief may be granted to your petitioner as to your honors shall seem meet; and that the decree appealed from may be sent to this court, and filed with the clerk thereof without delay.

And your petitioner will ever pray, &c.

J. S. MITCHELL,
Compl't, in per.

Dated the fifth day of September, 1838.

In the Court for the Trial of Impeachments and the Correction of Errors.

The answer of Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, respondents, to the petition of appeal filed against them, together with John Day, Simon Walker, James Greenway, Thomas Coleman, Robert Coleman, and the persons composing the several firms of Neven, Galbraith, and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruggs, Brown, Sharps, and Company, Joseph Lyon and Company, Bowerbank, Monkhouse, and Company, and Clegg and Parkhouse, Susan Mitchell, Ann Mitchell, Cornelia Mitchell, Eliza Mitchell, and George Mitchell, by John S. Mitchell, executor of the last will and testament, and devisee of Andrew Mitchell, deceased, appellant.

These respondents, not confessing or acknowledging all or any of the matters or things to be true, as in and by the said petition of appeal are contained and set forth, for answer thereunto, say, that they believe it to be true that such decretal order as is complained of by

the said appellant was made in the court of chancery for the State of New York, as in the said petition of appeal is set forth; but as to the date and particular contents thereof, and as to the several other decrees, orders, pleadings, and proceedings, in the said petition mentioned and referred to, these respondents humbly crave leave to refer thereto when the same shall be produced. And the said respondents are advised that the said decretal order of the said court of chancery is agreeable to equity and good conscience, and pray that the same may be affirmed, and that the said petition of appeal may be dismissed by this court, with costs, to be adjudged to these respondents.

RICHARD H. OGDEN, *Sol'r for resp'ts.*
T. L. OGDEN, *of counsel.*

In the Court for the Trial of Impeachments and the Correction of Errors.

The answer of John Day, respondent, to the petition of appeal filed, &c. *(the same as the preceding.)*

At a court of chancery held for the State of New York, at the city of Albany, on the fourth day of September, one thousand eight hundred and thirty-eight:

Present: REUBEN H. WALWORTH, *Chancellor.*

JOHN S. MITCHELL, executor, &c. of Andrew Mitchell, deceased,
vs.
ROBERT LENOX and others.

This cause having been submitted by the complainant in person, and counsel for the defendants, R. Lenox, John Johnston, and James S. Taylor, executors, &c. of John Taylor, deceased, and John Day; and the chancellor having duly considered the case, it is ordered, adjudged, and decreed, and the chancellor, by virtue of the power and authority of this court, doth order, adjudge, and decree, that the complainant's bill be dismissed, with costs, to be paid out of the estate of complainant's testator.

(Copy.) JOHN WALWORTH,
Assistant Register.

IN CHANCERY.

JOHN S. MITCHELL, executor, &c. of Andrew Mitchell, deceased,
vs.
ROBERT LENOX and others.

THE CHANCELLOR.—This case, so far as the rights of the defendant Lenox and the executors of Taylor are concerned, is substantially the same as it was upon the bill filed by the testator, A. Mitchell,

except as to the newly discovered documentary evidence, which was laid out of question there. Even without such newly discovered evidence, this court came to the conclusion that the complainant had consented to the assignment to the trustees. With such documentary evidence, there could not be a possible doubt on the subject; and this attempt to harass these defendants with a new suit, under the circumstances, was wholly inexcusable. And if the suit had been commenced by the executor after the death of the complainant in the first suit, instead of being commenced by such complainant in his life time, I should have considered it my duty to have charged the costs of the defence upon the executor personally. As it is, the bill must be dismissed, with costs, as to those defendants, to be paid out of the estate of the decedent, in the hands of the executor, J. S. Mitchell.

As the only relief asked for in this case against the defendant Day is to have the assignment to him set aside, and that the original assignees may account, and for such further relief as is consistent therewith, upon the case made by the bill; and as the defendant Day is not called upon to account for his administration of the trust estate, the proper course is to dismiss the bill as to him, without prejudice to the complainant's right to call him to account, on a bill properly framed, and showing that the decedent has such an interest in the trust fund as will authorize his executor to file such a bill. Here the allegations in the bill are sufficient to show that the complainant had an interest in the trust fund. But they are not admitted in the answer of the defendant Day, although he admits that Mitchell claimed the right to receive payment of the dividends due to some of the creditors. There is no admission in the answer of any surplus which would belong to the assignor after paying the creditors. The general traverse at the end of the answer put every thing in issue not admitted or otherwise answered. And no replication being filed, so as to give either party an opportunity to produce proofs, the case must depend upon the admissions in the answer only. The bill, as to the defendant Day, must, therefore, be dismissed without prejudice, &c., and with costs, to be paid out of the estate of Andrew Mitchell in the hands of his executor, if any such there be.

(Copy.) JAMES PORTER, *Register.*

Bill of Complaint in Chancery.

TO THE CHANCELLOR OF THE STATE OF NEW YORK:

Humbly complaining, showeth unto your honor, your orator, Andrew Mitchell, of the city of New York, merchant: That on the twentieth day of January, in the year of our Lord one thousand seven hundred and ninety-eight, your orator being indebted unto divers persons in divers sums of money, which he was then unable to pay; and several suits having been instituted against your orator for the recovery of the same; and your orator then being possessed of a

large real and personal estate, which, if prudently managed, was sufficient to pay his debts, and leave your orator a handsome residuary interest; your orator, on the day and year aforesaid, sealed and delivered a deed of assignment unto Robert Lenox, Hay Stevenson, and John Taylor, of the city of New York, merchants, and to the survivors or survivor of them, and to the heirs and executors of such survivor, all his real and personal estate, both in law and equity, in possession, reversion, and remainder, and all his books, vouchers, and securities, relating to the same: In trust, that the said Robert Lenox, Hay Stevenson, and John Taylor, should, with all convenient speed, sell and dispose of the said real and personal estate for the best price that could be had therefor, and also should collect and receive every sum of money, debt, and demand, due and owing unto your orator, from any person or persons whomsoever, and should apply the moneys arising from the sales of the assigned premises in manner following, to wit: In the first place, paying all claims and demands against the said Robert Lenox, Hay Stevenson, and John Taylor, or either of them, by reason or means of the trust thereby in them reposed. Secondly, paying all debts due from your orator to the United States. Thirdly, paying unto Hay Stevenson the sum of eight hundred dollars, and the residue for the mutual, equal or rateable use and benefit of such of the creditors of your orator as should *come* in under that assignment, and grant to your orator a general release or discharge at any time before the distribution should be made of the moneys arising from the assigned premises, and paying to your orator, his heirs, executors, administrators, or assigns, what should appear, on a fair account stated, to be remaining in their or his hands over and above the said debts, charges and expenses; and also in trust to reconvey and re-assign to your orator, his heirs, executors, administrators, or assigns, all such property or debts thereby assigned to the said Robert Lenox, Hay Stevenson, and John Taylor, as should be then not conveyed, unreceived, or unaltered, if any such there should be. The original of which said deed of assignment is in the possession or under the control of Robert Lenox, as your orator is informed and believes, and was recorded in the office of the register of the city and county of New York, in liber number ninety-eight of conveyances, page two hundred and fifty-nine, &c., on the twenty-seventh day of April, in the year one thousand eight hundred and twelve, as by reference to the record thereof will more fully appear; a copy of which said assignment is hereunto annexed, marked A.

And your orator further showeth unto your honor, that in pursuance of the said deed of assignment, your orator delivered to the said Robert Lenox, Hay Stevenson, and John Taylor, certain deeds of land, a list of which is contained in the schedule hereunto annexed, marked B, now on file in the office of the register of this court, at the city of Albany, ready to be proved according to the direction of your honor, the receipt of which deeds is acknowledged in writing by the said John Taylor, by a receipt to the original list annexed, dated the eleventh day of April, in the year one thousand seven

hundred and ninety-nine, which schedule he prays may be taken as part hereof, and fully answered as such.

And your orator further showeth unto your honor, that he also delivered to the said Robert Lenox, Hay Stevenson, and John Taylor, certain notes and obligations particularly set forth in the schedule annexed, marked C, amounting to twenty-eight thousand one hundred and six dollars and eight cents, the receipt of which notes and obligations is acknowledged in writing by John Taylor, one of the defendants, by a receipt to the original annexed, and dated on the twenty-second day of April, in the year one thousand seven hundred and ninety-nine, now on file in the office of the register of this court, at the city of Albany, ready to be proved according to the direction of your honor, which he prays may be taken as a part hereof, and fully answered.

And your orator further showeth unto your honor, that he also delivered to David A. Ogden, Esquire, counsellor at law, now deceased, at the request of the said Robert Lenox, Hay Stevenson, and John Taylor, previous to the said twenty-second day of April, in the year one thousand seven hundred and ninety-nine, his books of account, the delivery of which is acknowledged by the said John Taylor in writing, annexed to the original of schedule marked C, which he prays may be taken as a part hereof, and fully answered.

And your orator further showeth unto your honor, that Margaret, the wife of your orator, by a certain deed, dated the tenth day of February, one thousand seven hundred and ninety-eight, did execute and deliver a release of all her right and interest in and to the real estate of your orator, to the said Robert Lenox, Hay Stevenson, and John Taylor, and to the survivors and survivor of them, and to the heirs and executors of such survivor, upon the trust, to and for the uses and purposes in the said grant and assignment from your orator mentioned, the original of which said deed of the said Margaret is also in the possession or under the control of the said Robert Lenox, as your orator is informed and believes, and was recorded in the office of the register for the city and county of New York, on the twenty-seventh day of April, in the year one thousand eight hundred and twelve, in liber number ninety-eight of conveyances, page two hundred and sixty-two, as by reference to the record thereof will more fully appear, a copy of which said release is hereto annexed, also marked A.

And your orator further showeth unto your honor, that since the execution and delivery of the said deeds of assignment and release of your orator and his wife, Hay Stevenson and John Taylor, two of the trustees therein mentioned, departed this life, and that John Johnston and James S. Taylor are the executors of the last will and testament of the said John Taylor, deceased.

And your orator further showeth unto your honor, that certain creditors of your orator did, on the twentieth day of August, in the year one thousand seven hundred and ninety-eight, execute and

deliver to your orator a discharge and release in writing, in compliance with the terms of the said assignment, the original of which are on file in the office of the register of this court, at the city of Albany, and ready to be proved, according to the direction of your honor.

And your orator further showeth unto your honor, that he was indebted unto the respective creditors who executed the discharge and release to your orator, on the twentieth day of January, in the year one thousand seven hundred and ninety-eight, in the following sums of money, to wit:

Niven, Galbreath, & Co., - - - -	$7135 45
J. L. Phillips and Brothers, - - -	7734 50
Simon Walker, - - - - -	3468 00
Rhodes and Briggs, - - - -	5126 77
Knuckel and Ruys, - - - -	3152 19
Brown, Sharps, & Co., - - - -	4657 03
Joseph Lyon & Co., - - - -	998 00
James Greenway, - - - - -	360 00
Bowerbank, Monkhouse, & Co., - - -	5067 37
Thomas, John, and Robert Coleman, - -	1325 00
Clegg and Perkhouse, - - - -	3361 97
James Creighton, - - - - -	517 15
And to Anthony Blenon, who subsequently complied with the terms of said assignment, -	500 00
	$43,403 43

And your orator further showeth unto your honor, that on the twenty-seventh day of February, in the year one thousand seven hundred and ninety-nine, before any distribution was made of the moneys arising from the assigned premises, Anthony Blenon, one of the creditors of your orator, did execute and deliver to Robert M. Wellman, then of the city of New York, an assignment of a judgment in the supreme court of this State, obtained in the term of July, in the year one thousand seven hundred and ninety-eight, in his favor, against your orator, for five hundred and seventy-five dollars and one cent, which said deed of assignment was transferred to your orator by the said Robert M. Wellman, on the sixteenth day of May, in the year one thousand seven hundred and ninety-nine, which assignment is now in the possession of your orator, ready to be produced and proved according to the direction of your honor.

And your orator further showeth unto your honor, that before any distribution was made of the moneys arising from the assigned premises, your orator paid and settled with James Creighton, one of the creditors of your orator, who had complied with the terms of the said assignment, for the amount of his claim, and received an assignment from him for the same, being five hundred and seventeen dollars and fifteen cents, exclusive of interest, which assignment your orator has lost, and cannot recollect the date thereof.

And your orator further showeth unto your honor, that your orator did, on the tenth day of January, in the year one thousand seven

hundred and ninety-eight, execute and deliver to Hay Stevenson, a bond for the payment of eight hundred pounds, New York currency, and also a mortgage of the same date, on certain real estate, to secure a debt of eight hundred pounds, equal to two thousand dollars, owing by your orator to Edward Cairns, William Frears, and John Kirmichael, which bond and mortgage were delivered to them by the said Hay Stevenson; and the said Edward Cairns, William Frears, and John Kirmichael, covenanted to pay over to the said Robert Lenox, Hay Stevenson, and John Taylor, the surplus money arising from the sale of the mortgaged premises, by a covenant dated the twentieth day of May, in the year one thousand seven hundred and ninety-nine, which covenant is now in the possession of your orator, ready to be produced according to the direction of your honor.

And your orator further showeth unto your honor, that at the time of the delivery of the deeds of the real estate of your orator, as aforesaid, there was due and owing by your orator, to one Robert C. Johnson, the sum of one thousand four hundred and four pounds, seventeen shillings and six pence, New York currency, equal to three thousand five hundred and twelve dollars and nineteen cents, the payment of which was secured by a mortgage on one of the tracts of land comprising part of the real estate of your orator, being a tract of nine thousand acres, situate in the county of Chenango, in this state, being part of number ten, in Watkins and Flint's purchase, which amount was the balance of the purchase money for said tract of land, your orator having previously paid to the said Robert C. Johnson, on account of the consideration for said tract of land, the sum of seven thousand dollars in cash.

And your orator further showeth unto your honor, that at the time when the deed for the said nine thousand acres of land was delivered by your orator, in pursuance of the said assignment, your orator informed John Taylor, deceased, one of the said trustees, of the said incumbrance of one thousand four hundred and four pounds, seventeen shillings and sixpence, by a mortgage, and requested him to have the same paid; but your orator is informed and believes, the said tract of nine thousand acres afterwards was sold under a foreclosure of the mortgage by the said Robert C. Johnson, for a small sum of money, the precise price or sum for which it was sold your orator is not informed and does not know.

And your orator further showeth unto your honor, that at the date of said assignment, Galbreath and Elmes held a mortgage on the tract of two thousand one hundred and seventy acres of land on Lake Champlain, in the state of New York, to secure the sum of eight hundred and fourteen pounds and sixteen shillings New York currency, equal to two thousand and thirty-seven dollars.

And your orator further showeth unto your honor, that previous to the twentieth day of January, in the year one thousand seven hundred and ninety eight, your orator was indebted unto the firm or company of Greenway and Potter, in the sum of two thousand two hundred and forty-six pounds, New York currency, equal to five thousand six

hundred and fifteen dollars, and executed and delivered to the said John Taylor, deceased, a bond and mortgage to secure that amount on a tract of land of one thousand nine hundred and ninety-seven acres, situate in the town of Owego, on the Susquehanna river, in Yates's location, in the state of New York; that the said John Taylor, deceased, after he became a trustee for your orator, had the said mortgage foreclosed, and the said tract of land sold for one thousand and forty dollars and ten cents, which was purchased by William Wilson, for and on behalf of the said John Taylor, deceased, and that the said John Taylor, deceased, appropriated the said tract of land to his own use and benefit.

And your orator further showeth unto your honor, that the following is a memorandum of the dates of the deeds, names of grantors, number of acres, and situation of the several parcels of land, the deeds of which were delivered by your orator to the said Robert Lenox, Hay Stevenson, and John Taylor.

Date of Deeds.	From whom bought.	No. of Acres.	Situation, &c.
1794, Jan. 14	Benjamin Eaton	1080	Painted Post in Tioga Co.
1795, Feb. 14	John Konkle	124	
1794, Jan. 3	Solomon Martin	230	Town of Franklin in Otsego Co.
Do.	Benjamin Hovey	243	No. 82, do.
1792, Oct. 6	Jabez Petit, copy	600	No. 47, in the Military township of Dryden.
Do. 13	B. & J. Wilson	80	Town of Schoharie, Albany Co.
1790, Dec. 23	A. Campbell	333⅓	On South Bay, Lake Champlain.
1793, June 5	Wm. Holme, copy	600	No. 92, Military township of Cicero.
Nov. 5	Levy Houghton	300	Champlain town, Clinton Co.
Dec. 16	Benj. Hovey, copy	600	No. 100, Military township of Solon.
Do.	Do.	600	No. 39, Military township of Virgil.
1794	Leb. Fisher	1997	Town of Owego, on the Susquehanna river, in Yates' location. This tract is mortgaged to John Taylor (for Greenway and Potter,) for £2246.
July 8	Robert C. Johnson	9000	Part of No. 10, in Watkins and Flint's purchase. There is a balance of £1404 17 6 due on a note and mortgage on this tract to R. C. Johnson.
	John Williams	2170	Lying on Lake Champlain, Washington Co. This tract is mortgaged to Galbreath and Elmes, for the payment of £814 16.
1795, Feb. 2			
1794, Dec. 6	Solomon Martin	200	Part of lot No. 89, town of Jericho, Clinton Co.
Do. 9	Mason Wattles	143	Lot N. 30, t'wn of Union, Tioga Co.
	Do.	143	——41,
	Do.	572	——47,49,53,54,
1794, Dec 13	Benjamin Hovey	100	Town of Fayette, Tioga Co. This lot is sold to E. Early, but no deeds granted yet.
	Do.	250	No. 88, in Clinton, Tioga Co.
	Do.	120	No. 72, Fayette, do.
	Do.	300	No. 42, 59 and 61, in the gore town of Fayette.
	Do.	189	Town of Jericho, Tioga Co.
	Do.	50	No. 73, town of Fayette, Tioga Co.

Date of Deeds.	From whom bought.	No. of Acres.	Situation, &c.
1794, Dec. 13	Benjamin Hovey	200	Part of lot No. 99, in Fayette.
Do.	Benjamin Seixas	880	Lot No. 126, in Chemung, Tioga Co.
1795, April 20	Solomon Murray	231	Lot No. 12, in the Massachusetts pre-emption, Co. of Ontario.
Do. 4	Nathaniel Wattles	247	No. 49, in Franklin, Otsego Co.
June 26	John L. Winney	——	A house and lot at Fort Miller.
	Solomon Martin	580	No. 39,56,64 and 34, in town of Jericho, Tioga Co.
1797, June 14	Benjamin Hovey	300	With a grist and saw mill; a very good farm.
	Do.	200	Two farms of 100 acres each.
	Ebenezar Averal	110	A farm, a good house, and other buildings, at Harper's field.
1797, June 14	Benjamin Hovey	186½	A fine farm, a good house, and a tan yard, situated at Harper's field, known by the name of Patchin's. There is a balance of £112 10 due F. Patchin on this farm. It is also mortgaged to Hay Stevenson, for Cairns, Frears & Kirmichael, for £800.

Also, my proportion of land deeded to James Scott and P. McDougal, by Peter Fearchild & Co., for the benefit of all their creditors.

And your orator further showeth unto your honor, that the amount of debts due to the United States by your orator, on the twentieth day of January, in the year one thousand seven hundred and ninety-eight, but payable afterwards, was the sum of seven hundred and sixty-nine dollars and thirty-nine cents, being the following bonds, viz:

One bond per Factor, due 6th April, 1798,	-	$ 73 66
" Pigeon, - - -	-	170 39
" Belvidere, - - -	-	67 65
One bond per swan, due 22d May, 1798,	-	119 35
" Friendship, 12th May, "	-	169 66
" Friendship, 12th July, "	-	168 68
		$769 39

which have been paid, and also the debt due to Hay Stevenson, deceased..

And your orator further showeth unto your honor, that your orator also delivered to the said Robert Lenox, Hay Stevenson, and John Taylor, in pursuance of the said deed of assignment, certificates for two shares in the stock of the Western, and one share in the stock of the Northern Inland Lock Navigation Company, then valued at three hundred and fifty dollars; also, the interest of your orator in thirty-four land warrants, twenty-five of which were deposited with A. H. Hardenburgh, by your orator, as security for the payment of a note for one thousand dollars, and nine of which were deposited with George Suffern, as security for four hundred and seventy-eight dol-

lars and seventy-five cents; also, a lease for stables in Maiden Lane, in the city of New York.

And your orator further showeth unto your honor, that the amount of debts due to your orator, on the twentieth day of January, in the year one thousand seven hundred and ninety-eight, was nineteen thousand two hundred and sixty-five pounds, eighteen shillings, and four pence, New York currency, equal to forty-eight thousand one hundred and sixty-four dollars and seventy-nine cents, which will more fully appear by his leger and books of account, in the possession or under the control of the said Robert Lenox.

And your orator further showeth unto your honor, that your orator, on the twentieth day of January, in the year one thousand seven hundred and ninety-eight, was a creditor of the firm or company known by the name of Peter Fearchild and Company, then of the city of New York, who became insolvent, and conveyed by deed to James Scott and Peter McDougal, then of the city of New York, certain real estate for the benefit of all their creditors; and the interest of your orator, in the said estate of Peter Fearchild and Company, the amount of which he cannot recollect, was assigned by your orator, with his real and personal estate, to the said Robert Lenox, Hay Stevenson, and John Taylor.

And your orator further showeth unto your honor, that he has been informed and believes that all that part of the real estate so assigned, by your orator as aforesaid, to the said Robert Lenox, Hay Stevenson, and John Taylor, on the twentieth day of January, in the year one thousand seven hundred and ninety-eight, which was free from all incumbrances, still remains unsold and undisposed of by them, the survivors or survivor of them. That none of the mortgaged lands were redeemed, and that no interest was paid on the sums for which they were mortgaged, and that the said Robert Lenox, and John Taylor, deceased, have converted the book debts, notes, obligations, and receipts, and other personal property of your orator's estate, to their own use.

And your orator further showeth unto your honor, that he has received as assignee of the said Anthony Blenon and James Creighton, in the year one thousand eight hundred and sixteen, the sum of seventy dollars, and the further sum of seventy dollars, in the year one thousand eight hundred and twenty-one; and also the further sum of seventy dollars, on or about the seventeenth day of February, in the year one thousand eight hundred and thirty, which payments were made to your orator as assignee as aforesaid, and on account of the said debts of Anthony Blenon and James Creighton, and were paid to your orator out of moneys received from the estate of your orator, assigned as aforesaid to the said Robert Lenox, Hay Stevenson, and John Taylor, and your orator has not received any other or further sums of money whatever, on account of said debts.

And your orator further showeth unto your honor, that on the twenty-fourth day of February, in the year one thousand eight hundred and thirty, your orator, through his solicitor, addressed a letter

to the said Robert Lenox, and John Taylor, deceased, and caused a copy to be delivered to each of them, calling upon them for an account of his estate assigned and delivered to them, in pursuance of the deed of assignment of the twentieth of January, one thousand seven hundred and ninety-eight. And your orator again, on the sixth day of March, in the year one thousand eight hundred and thirty, through his solicitor, addressed another letter to the said Robert Lenox, and John Taylor, deceased, and caused a copy to be delivered on the same day to each of them, calling upon them to account to your orator as aforesaid. That your orator, not having received any account of his estate, filed a bill of complaint in this court, on or about the fifth day of April, in the year one thousand eight hundred and thirty, against the said Robert Lenox, and John Taylor, deceased, for an account of his estate, assigned and delivered to them as aforesaid. That subsequent proceedings were had, and the creditors of your orator herein named as parties in this bill, were made parties in that suit. And on the fourteenth day of January, in the year one thousand eight hundred and thirty-three, the vice chancellor of the first circuit of the State of New York made a decree, "that the complainant's bill be dismissed, with costs, and that the defendants have execution therefor; but this dismissal is without prejudice to the complainant's right to make these defendants parties to a new bill, if he shall think proper to file one against the second trustees, or the survivor of them." That an appeal having been made from the said decree to the chancellor of the State of New York, the chancellor, on the third day of March, one thousand eight hundred and thirty-five, made a decree as follows:

ANDREW MITCHELL
vs.
ROBERT LENOX and others.

"This cause having been brought on to be heard before the chancellor, at the last term of this court, upon an appeal from a decree of the vice chancellor of the first circuit, dismissing the complainant's bill, with costs, but without prejudice to the right of the complainant to make these defendants parties to a new bill against the second trustees, or the survivor of them, if he should be so advised. And counsel for the respective parties having been heard, and the chancellor having duly considered the case: It is ordered, adjudged, and decreed, and the chancellor, by virtue of the power and authority of this court, doth order, adjudge, and decree, that the said decree so appealed from be, and the same hereby is, affirmed. And it is further ordered, that the complainant pay to the defendants their costs of this appeal, to be taxed, and that they have execution therefor, according to the course of practice in this court."

That an appeal was made from said decree to the court for the correction of errors of the State of New York, and in December, one thousand eight hundred and thirty-five, the said court for the correction of errors affirmed the said decree of the chancellor, with costs.

And your orator further showeth unto your honor, that the said

Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, according to the best knowledge, information, and belief of your orator, are justly indebted to your orator, by reason of the premises, in a large sum of money; the precise amount of such indebtedness your orator does not know, and cannot state.

And your orator further showeth unto your honor, that he is informed and believes, that on the eighth day of February, one thousand eight hundred and twelve, the said Robert Lenox, and John Taylor, deceased, made and executed an assignment of the whole of your orator's estate, and of all sums of money which had been received under the assignment of January twentieth, one thousand seven hundred and ninety-eight, to James M'Evers, David A. Ogden, and John Day, then of the city of New York, the survivors or survivor of them, and delivered over the trust property to them, to perform the same trusts which the said Robert Lenox, Hay Stevenson, and John Taylor, undertook to perform under the assignment of your orator of twentieth of January, one thousand seven hundred and ninety-eight. And that since the date of the said assignment of eighth February, one thousand eight hundred and twelve, the said James M'Evers and David A. Ogden have departed this life.

And your orator further showeth unto your honor, that the trust estate herein before set forth was more than sufficient to pay all the debts of your orator, for which it was assigned to Robert Lenox, Hay Stevenson, and John Taylor, and your orator does not know whether the said debts have been paid. And your orator does not know the names of the individuals composing the firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckle and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse.

And your orator had well hoped that the said Robert Lenox, and John Taylor, deceased, would have justly and fairly discharged their duties as assignees of your orator, and complied with the aforesaid reasonable request of your orator, as in conscience and equity they ought to have done.

But now so it is, may it please your honor, that the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, combining and confederating together with John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckle and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, and divers persons as yet unknown to your orator, (but whose names, when discovered, your orator prays may be inserted herein as defendants and parties to this your orator's suit, with proper and sufficient words to charge them with the premises,) in order to oppress and injure your orator, do absolutely refuse, under various unjust, frivolous,

and inequitable pretences, to render any account to your orator of the disposal and situation of the real and personal estate of your orator, assigned to them as aforesaid, or to account to your orator when and how much of the personal estate of your orator, so assigned as aforesaid, was realized in money; what amount of debts owing to the estate remain unpaid; or to account to whom the money collected was paid, and when and how disposed of, or to account for the real estate of your orator, so assigned as aforesaid; or to account to your orator for the rents and profits of said real estate, the times when and how the said rents and profits have been received; and if from tenants, then how much from each, and the particular lots or parcels occupied by them respectively, and by what tenure.

And your orator submits, that the said Robert Lenox, and John Taylor, deceased, by neglecting to pay and satisfy the incumbrance of one thousand four hundred and four pounds, fourteen shillings and six pence, on the tract of nine thousand acres of land herein before described, have made the said Robert Lenox, and the executors of John Taylor, liable to account to your orator for the full value of that land; and also for the other mortgaged lands which they have neglected to redeem, deducting the amount of the incumbrances.

And your orator chargeth, that the said Robert Lenox, and John Taylor, deceased, have been guilty of gross neglect in the management of your orator's estate, assigned to them and Hay Stevenson, deceased, and have converted a large part thereof to their own use; and that the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, are justly indebted to your orator in a large sum of money, exclusive of the unincumbered real estate, for the surplus of the estate of your orator, assigned to Robert Lenox, Hay Stevenson, and John Taylor, as aforesaid.

All which actings, pretences and doings of the said Robert Lenox, and John Taylor, deceased, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, and their confederates, are contrary to equity and good conscience, and tend to the manifest injury and oppression of your orator.

In tender consideration whereof, and for as much as your orator is remediless in the premises by the strict rules of the common law, and relievable only in a court of equity, where matters of this nature are properly cognizable and relievable:

To the end, therefore, that the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckle and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, and their confederates, when discovered, may full, true, direct and perfect answer make upon their corporal oaths, according to their

respective knowledge, information and belief, to all and singular the charges and matters aforesaid, as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated; and more especially whether the said Robert Lenox, and John Taylor, deceased, received any money, how much, and when, from Edward Cairns, William Frears, and John Kirmichael, or either of them, or any person in their behalf, for, or on account of a certain mortgage made by your orator to secure to them the payment of two thousand dollars, herein before described; or whether the said mortgage was redeemed by the said Robert Lenox, and John Taylor, and when? or foreclosed by whom, and when, and for what sum? and if redeemed, what disposal was made of the redeemed premises? and whether the incumbrance of one thousand four hundred and four pounds, seventeen shillings and six pence, on said tract of nine thousand acres of land herein before described, was paid by the said Robert Lenox, and John Taylor, deceased, or whether the land was sold under a foreclosure of the mortgage? and if sold, for what price, and when? or if redeemed by the said Robert Lenox, and John Taylor, deceased, what disposal was made of the said land, and when? and whether the land mortgaged by your orator to John Taylor, deceased, to secure the payment of two thousand two hundred and forty-six pounds, was sold under a foreclosure of the mortgage, or in any other manner, to pay the said debt? when, to whom, and for what sum? or if redeemed by the said Robert Lenox, and John Taylor, deceased, what disposal they made of the said land? and whether the incumbrance of eight hundred and fourteen pounds and sixteen shillings, on said tract of two thousand one hundred and seventy acres of land on Lake Champlain, herein before described, was paid by the said Robert Lenox, and John Taylor, deceased? or whether the land was sold under a foreclosure of the mortgage? and if sold, for what price, and when? or if redeemed by the said Robert Lenox, and John Taylor, deceased, what disposal was made of the said land, and when? and that the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, may state what disposal was made of the stock in the Western and Northern Inland Lock Navigation Company, and when? and what disposal was made of the thirty-four land warrants, held by A. H. Hardenburgh, and George Suffern, as security for money owing to them by your orator; and whether any money, and how much, was received by the said Robert Lenox, and John Taylor, deceased, for, on account of, or from the sale of the said land warrants, and when? and how much money was received by them, for or on account of the lease for stables in Maiden lane, and when? or for the use and occupancy of the said stables? and also that the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, may set forth a particular account of the whole estate of your orator, both real and personal, from the date of the assignment by your orator, on the twentieth day of January, in the year one thousand seven hundred

and ninety-eight, to the present time, stating how each parcel of the real estate is disposed of? when, to whom, and the manner of the sale or disposal? and what terms, and for how much? and how much money has been received from the personal estate of your orator, and the times when so received? and how, and when, the said money has been disposed of, appropriated or paid? and if any debts due to the estate of your orator, assigned, as aforesaid, remain unpaid, and which of them? and whether any, and what measures were taken to enforce the collection of such of the said debts as remain unpaid, and what measures in particular were taken in relation to each debt respectively? and whether the said Robert Lenox, and John Taylor, deceased, have paid, or caused to be paid, any creditor or creditors of your orator, entitled to receive the same under the assignment aforesaid, any money or other property; and if so, which of them, when, and how much to each one respectively? and that the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, may set forth what rents and profits have been received from the respective parcels of the real estate of your orator, assigned as aforesaid, and set forth all agreements and contracts, documents and accounts, in relation to the occupancy of the same; to the end that a full, final and perfect adjustment of the said estate may be carried into effect, and all just and proper allowances made to your orator, and all just and proper allowances and charges made to and against the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased; and that the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, may be decreed to pay unto your orator such sum of money as may be found to be due to your orator, and to re-convey to him the real estate conveyed to Robert Lenox, Hay Stevenson, and John Taylor, by your orator, and that the said assignment, dated the eighth day of February, one thousand eight hundred and twelve, made by Robert Lenox, and John Taylor, deceased, to James M'Evers, David A. Ogden, and John Day, may be set aside as null and void; and that your orator may have such further and other relief in the premises, as the nature of the case shall require, and as to your honor shall seem meet.

May it please your honor to grant unto your orator the most gracious writ of subpœna of the people of the State of New York, issuing out of and under the seal of this honorable court, to be directed to the said Robert Lenox, John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, and their confederates, when discovered, commanding them at a certain day, and under a certain

pain therein to be specified, personally to be and appear before your honor, in this honorable court, and then and there to answer all and singular the premises aforesaid, and to stand to, perform and abide such order, direction, and decree therein, as to your honor shall seem meet.

And your orator will ever pray, &c.

ANDREW MITCHELL.

JOHN S. MITCHELL,
Solicitor, and of Counsel for Comp't.

F. A. TALMADGE, *of Counsel.*

Schedule A.

This indenture, made the twentieth day of January, in the year of our Lord one thousand seven hundred and ninety-eight, between Andrew Mitchell, of the city of New York, and State of New York, merchant, of the first part, and Robert Lenox, Hay Stevenson, and John Taylor, of the same place, merchants, of the second part. Whereas the said Andrew Mitchell stands indebted to divers persons in divers sums of money, which he at present is unable to pay, and several suits have been instituted by several of his creditors, for the recovery of their demands, in certain of which suits judgments will soon be entered. And whereas the said Andrew Mitchell is of opinion that his property, if prudently managed, will prove sufficient to pay his debts and leave him a handsome residuary interest; on the contrary, if sold at sheriff's sales, or otherwise injudiciously disposed of, may fall short of discharging his debts, and prove of real damage to his creditors in general, and highly injurious to himself and family. To guard against which evils, and with a view of placing all his creditors, except those hereafter excepted, on an equal footing with respect to the payment of their demands, the said Andrew Mitchell hath concluded to make an assignment of all his property to Robert Lenox, Hay Stevenson, and John Taylor, for the benefit of his creditors. Now this indenture witnesseth, that the said Andrew Mitchell, as well in consideration of the premises, as of the sum of one dollar to him paid by the said parties of the second part, before the sealing and delivery of these presents, the receipt of which he doth hereby acknowledge, hath granted, bargained, sold, released, conveyed, and assigned, and by these presents doth grant, bargain, sell, release, convey, and assign unto the said parties of the second part, and to the survivors and survivor of them, and to the heirs and executors of such survivor, all his estate, real and personal, both in law and equity, in possession, reversion and remainder, and all his books, vouchers, and securities, relating to the same; to have and to hold the same unto the said parties of the second part, and the survivors and survivor, and the heirs and executors of such survivor; in trust, nevertheless, that the said parties of the second part, and the survivors and survivor of them, and the heirs and executors of such survivor, do with all con-

venient speed sell and dispose of all and singular the real and personal estate aforesaid, for the best price that can be had therefor, and thereupon make, execute, and deliver to the purchaser and purchasers thereof, or of any part thereof, good and sufficient conveyances and assurances in the law, to grant and convey the same unto the said purchaser or purchasers, in fee simple or otherwise, as the case may require; and also collect and receive every sum of money, debt and demand, due and owing unto him, the said Andrew Mitchell, from any person or persons whomsoever, and upon receipt thereof, or of any part thereof, good and valid discharges therefor, for him, and in his name, to make and execute, and to apply the moneys arising from the sales of the assigned premises in manner following, to wit: in the first place, paying all claims and demands against the said parties of the second part, any or either of them, by reason or means of the trust hereby in them reposed. Secondly, paying all debts due from him to the United States of America. Thirdly, paying unto Hay Stevenson the sum of eight hundred dollars, and the residue for the mutual, equal, or rateable use and benefit of such of the creditors of the said Andrew Mitchell, as shall come in under this assignment, and grant the said Andrew Mitchell a general release or discharge at any time before distribution be made by the said assignees, any or either of them, of any moneys arising from the assigned premises, and in no other manner whatsoever, except as regards any residuary interest, as to which, if any, provision is hereinafter made; and full power is hereby granted by the said Andrew Mitchell to the said parties of the second part, and the survivors and survivor of them, and the heirs and executors of such survivor, to make distribution of the moneys which may come to their or his hands, from the assigned premises, whenever and as often as they or he may consider fit; and power is hereby granted to the said parties of the second part, and to any two of them, and the survivor of them, to act in all respects in and about the premises, as fully as the said Andrew Mitchell might or could have done, in case these presents had not been made and executed; and lastly, it is understood by and between the said parties of the first and second parts, that after paying and discharging all debts due from the said Andrew Mitchell, and all expenses and charges attending the execution of the trust aforesaid, that the said parties of the second part, and the survivors and survivor of them, and the heirs and executors of such survivor, are or is to pay unto the said Andrew Mitchell, his heirs, executors, administrators, or assigns, what shall appear, on a fair account stated, to be remaining in their or his hands, over and above the said debts, charges, and expenses, and also reconvey and re-assign to the said Andrew Mitchell, his heirs, executors, administrators, or assigns, all such property or debts hereby assigned to the said parties of the second part, as shall be then not conveyed, unreceived, or unaltered, if any such there be. In witness whereof, the parties to these presents have hereunto inter-

changeably set their hands and seals the day and year first above written. ANDREW MITCHELL, [L. S.]

Sealed and delivered in the presence of
JOHN H. REMSEN, and
J. G. VARICK.

Recorded in the office of the clerk of the city and county of New York, in liber No. ninety-eight of conveyances, &c., page two hundred and fifty-nine, this twenty-seventh day of April, at two o'clock, P. M.

Examined by me, GARRET GILBERT, *Clerk.*

Know all men by these presents, that I, Margaret Mitchell, wife of the within named Andrew Mitchell, do hereby acknowledge that the within grant, sale, and assignment by my husband of all his real and personal estate was made by him, by and with my consent and approbation; and for the reasons and consideration therein expressed, I have released and quit claimed, and by these presents do release and quit claim, unto the said Robert Lenox, Hay Stevenson, and John Taylor, within named, and to the survivors and survivor of them, and to the heirs and executors of such survivor, all my estate, right, title, interest, claim, and demand, of, in and to, all and singular the real estate so granted, sold, and assigned, by my said husband to the said Robert Lenox, Hay Stevenson, and John Taylor, to have and to hold the same unto the said Robert Lenox, Hay Stevenson, and John Taylor, and to the survivors and survivor of them, and to the heirs and executors of such survivor, upon the trusts, and to and for the uses and purposes, in the within written assignment expressed. In witness whereof, I, the said Margaret Mitchell, have hereunto set my hand and seal, and I, the said Andrew Mitchell, within named, do hereby join in the above deed, and hereby become a party thereto, and have also hereunto set my hand and seal, the tenth day of February, in the year one thousand seven hundred and ninety-eight.

ANDREW MITCHELL, [L. S.]
MARGARET MITCHELL, [L. S.]

Sealed and delivered in the presence of (the word "my" interlined)
JAMES KENT.

STATE OF NEW YORK, *ss:*

On the tenth day of February, one thousand seven hundred and ninety-eight, before me, came Andrew Mitchell, and Margaret his wife, and I knowing them to be the within described, or rather above described grantors, the said Andrew acknowledged that he executed the above deeds, and the said Margaret, being by me examined privately, apart from her husband, confessed that she executed the same freely, without any fear or compulsion of her husband, and I finding no erasure or interlineations therein but the one noted, do allow it to be recorded. JAMES KENT, *Master in Chancery.*

SCHEDULE B.

List and Receipt for Deeds.

Account of deeds delivered to Robert Lenox, Hay Stevenson, and John Taylor, April 10, 1798.

Acres.		No.	Deeds.
1080	Benjamin Eaton	1	2
124	John Konkle -	2	
230	S. Walters - -	3	
342	B. Hovey - -	4	1
600	Jabez Petit - -	5	1 copy.
80	B. & J. Willson -	6	1
333⅓	A. Campbell -	7	1
600	W. Holmes - -	8	1 copy.
300	Levy Houghton -	9	1
600	B. Hovey - -	10	1 copy.
600	do. - -	10	1
1997	S. Fisher - -	12	1
9000	R. C. Johnson -	13	1
2170	J. Williams - -	14	1
200	S. Martin - -	17	1
143	M. Wattles - -	18	1
143	do. - -	19	1
572	do. - -	20	1
100	B. Hovey - -	22	1
250	do. - -	24	1
120	do. - -	25	1
300	do. - -	26	1
189	do. - -	27	1
80	do. - -	28	1
200	do. - -	29	1
300	B. Seixas - -	30	1
231	S. Murray -	33	1
247	N. Wattles - -	36	1
House and lot	J. L. Winney -	37	1
580	S. Martin - -	39	1
300	B. Hovey - -	41	1
200	do. - -	42	Obligation for 100 acres.
"	do. - -	43	Deed for 100 do.
110	E. Averal - -	44	

Received, New York, 11th April, 1799, from Andrew Mitchell, the above-mentioned deeds.

For other assignees and self,

JOHN TAYLOR.

SCHEDULE C.

List of Notes and Receipts.

Date.	By whom drawn.	Time.	Amount.
1785, May 3	John M'Gill	on demand	£ 15 4 0
Nov. 15	Benjamin Dubois	4 months	173 9 2
1787, Nov. 14	Abraham King	3 months	56 12 3
1788, Sep. 26	William Hubbell	6 months	12 0 0
1789, April 24	Benjamin Haight	6 months	38 12 3
Nov. 24	John Duncan	6 months	72 2 8
1791, May 17	John Price's acceptance	sight	9 0 0
" 18	Zenas Goodrich	4 months	8 14 0
Sep. 29	J. & B. Winney	6 months	237 1 0
Nov. 11	Benjamin Haight	6 months	158 12 8
Dec. 2	Justus & U. M. Gregory	6 months	198 0 0
1792, April 20	do.	6 months	39 7 0
June 26	do.	6 months	166 15 0
Oct. 26	John L. Winney	6 months	1187 0 0
" 31	J. & U. M. Gregory	6 months	115 2 0
Dec. 11	do.	6 months	323 19 0
1793, May 11	Uriah M. Gregory	6 months	88 8 6
June 13	Case & Palmer	6 months	116 3 4
Oct. 24	William Henson	30 days	269 5 6
Nov. 25	J. L. Winney	6 months	434 10 0
Dec. 11	Thomson & Lewis	30 days	158 14 3
1794, Nov. 11	Richard Stuart	6 months	877 0 0
1795, Jan. 23	John De Grashe, 4 notes, 15 each.		60 0 0
" 29	Wm. Cowrin	30 days	110 0 0
Feb. 25	Richard Abbott	30 days	44 0 0
April 2	Josiah Adams & Co. $6,875 26	60 days	2750 2 1
Jan. 29	Wm. Cowrin	45 days	109 18 6
April 11	Noah Gardner	30 days	69 4 6
Nov. 2	Aaron Burnett	6 months	51 15 3
1796, May 12	Lawrence & Chamberlain	4 months	81 8 3
Oct. 13	John Banks	10 days	59 4 7
	do.	20 days	59 6 10
	do.	30 days	59 9 2
" 27	John Little	6 months	91 12 6
Dec. 2	Houghton & Stearns	30 days	802 3 1
" 5	Jacob C. Schermerhorn & Sons	10 days	384 17 2
" 6	Lemuel Johnson	30 days	4 6 3
" 14	Daniel Hebard	17 days	114 1 10
1797, April 25	James Hunt	12 months	8 4 0
July 5	Joseph Page	sight	12 0 0
Sept. 6	Peter G. Waldron	do.	5 0 0
1798, April 15	James J. Rosevelt	do.	24 10 8
1795, Jan. 14	Thomas C. Butler	15 months	1600 0 0
1794, Sept. 22	John Andrews Bond	12 months	85 11 5

PROTESTED BILLS.

1790, December 28, J. Philips on James Philips, London, 30 days,	£72 sterling
1789, December 21, George Walker on James Trimbey, 60 days,	60

John W. Haydock and Andrew Mitchell's agreement respecting Elisha Coan, New York, 15th July, 1796, received.

Galbreath and Elmes' receipt for a mortgage on land, dated New York, 24th January, 1798, received.

Thomas B. Littlejohn's receipt for Charles Saunder's note of hand, dated 21st May, 1793, at 6 months, for £378, received.

William Cutting's receipt for Robert Crommelin's note of hand, dated 22d March, 1796, for $1,480, received.

John Price's obligation to refund what deficiency may arise from the settlement of his estate, in the debt due to him, 31st July, 1792, received.

Received, New York, 22d April, 1799, from Mr. Andrew Mitchell, the notes and obligations, as stated on the foregoing page or folio of this sheet, in compliance with his assignment made to us for the benefit of his creditors.

For Robert Lenox, Hay Stevenson and self.

JOHN TAYLOR.

N. B. Agreeable to our request, Mr. Mitchell has delivered his books to Mr. David A. Ogden.

JOHN TAYLOR.

Copy of Release.

To all whom these presents shall come or may concern—we, whose names are hereunto subscribed, and seals affixed, creditors, or authorized by and subscribing for creditors of Andrew Mitchell, of the city of New York, merchant, send greeting:

Whereas, the said Andrew Mitchell is at present unable to pay and satisfy the several sums of money wherein he stands indebted to us, or those for whom we subscribe, and hath offered and proposed to grant, convey, and assign, all his estate, real and personal, for the benefit of his creditors, on their giving him a general release or discharge, which has been acceded to on the part of his creditors; and the said Andrew Mitchell hath accordingly executed and delivered a grant, conveyance and assignment of all his estate, real and personal, for the benefit of his creditors. Now, know ye, that we, the said creditors, who have executed these presents, for our respective heirs, executors, administrators, partners and assigns, have remised, released, and forever discharged, and by these presents do remise, release, and forever discharge the said Andrew Mitchell, his heirs, executors, and administrators, of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sum and sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, agreements, promises, damages, judgments, executions, claims and demands whatsoever, in law and equity, which against the said Andrew Mitchell we ever had, now have, or which our respective heirs, executors, or administrators, hereafter can, shall, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents. And we do hereby severally and respectively release and quit claim unto the said Andrew Mitchell, his executors, administrators, and assigns, for ever, our right and interest in and

to the household goods and furniture, so as aforesaid transferred by him to and for our benefit.

In witness whereof, we have hereunto set our hands and seals, the 20th day of August, in the year of our Lord one thousand seven hundred and ninety-eight.

Sealed and delivered in the presence of
ROBERT M. WELMAN.

Thomas Elms, [L. S.]
Attorney for Wm. Niven, Galbreath & Co.

James Philips, [L. S.] } Eight thousand and twenty dollars and sixty-two cents, including interest to this day.
Attorney for J. L. Philips & Brother.

A. Walker, jr. [L. S. } Three thousand six hundred seventy dollars and thirty-four cents.
Attorney for Simon Walker.

John Rhodes, [L. S.] } Five thousand four hundredand thirty-nine dollars and ninety-four cents.
Attorney for Rhodes & Briggs.

Henry Knuckel, [L. S.]
Attorney for Knuckel and Ruys.

Le Roy, Bayard & McEvers, [L. S.]
Attorneys for Brown, Sharps & Co.

Joseph Lyon & Co. [L. S.]

John Taylor, [L. S.] } For the sum of three hundred and sixty dollars.
Attorney for James Greenway, jr.

Thomas Monkhouse, [L. S.]
Att'y for Bowerbank, Monkhouse & Co.

Thomas, John and Robert Coleman. [L. S.]

John Taylor. [L. S.]

John Hobson. [L. S.]
Attorney for Messrs. Clegg & Perkhouse.

J. Creighton, [L. S.]

Andrew Mitchell, [L. S.]
Attorney for Anthony Blenon.

Endorsed.

"Release, August 20th, 1798."

"Read on hearing, 27th and 28th January, 1835."
"J. P., *Register.*"

"No. 4." "Filed, March 3, 1835."

"Read on hearing, October 16th, 1832."
Copy, "J. W., *Clerk.*"

JAMES PORTER, *Register.*

Copy of Discharge.

To all whom these presents shall come—we, who have executed these presents, creditors, or acting in behalf of creditors of Andrew Mitchell, of the city of New York, in the State of New York, merchant, send greeting:

Whereas, the said Andrew, by a certain deed, bearing date the twentieth day of January, in the year of our Lord one thousand seven hundred and ninety-eight, did, for the reasons and causes therein expressed and mentioned, grant, bargain, sell, release, convey, and assign unto Robert Lenox, Hay Stevenson, and John Taylor, of the same city of New York, merchants, and to the survivors and survivor of them, and to the heirs and executors of such survivor, all his estate, real and personal, for the benefit of his creditors, as by reference to the said deed will more at large appear. And whereas, Margaret Mitchell, wife of the said Andrew, in and by a certain deed, bearing date the tenth day of February, in the year aforesaid, did release all her right and interest in and to the real estate of the said Andrew to the beforementioned persons, and to the survivors and survivor of them, and to the heirs and executors of such survivor, upon the trusts, and to and for the uses and purposes in the grant and assignment from the said Andrew set forth, as by reference to the said last mentioned deed will also more fully appear. And whereas, the undersigned are desirous that the trust so reposed in the beforementioned persons should be executed by them, and the said assignees are disposed to carry the said trust into execution; now these presents witness, that we, the subscribers, do hereby accept of the assigned premises in full of our respective claims and demands against the said Andrew Mitchell, and do hereby exonerate the said Andrew from all further responsibility, for and on account of our respective debts and demands. And we hereby consent and agree that the said Robert Lenox, Hay Stevenson, and John Taylor, and the survivors and the survivor of them, and the heirs and executors of the survivor, shall and may conduct and manage the assigned premises, either in person, or by such person or persons as they may think proper to appoint, in the manner they may conceive most conducive to the interests of the parties concerned, and we agree to abide by and confirm whatsoever shall be done by the said assignees, and the survivors and survivor of them, and the heirs and executors of the survivor, in and about the assigned premises.

In witness whereof, we have hereunto set our hands and seals, this twentieth day of August, in the year of our Lord one thousand seven hundred and ninety-eight.

Witnessed by
ROBERT M. WELMAN.

Thomas Elms, [L. S.]
Attorney for Wm. Niven, Galbreath & Co.

James Philips, for J. L. Philips & Brother.	[L. S.]	Eight thousand and twenty dollars and sixty-two cents, including interest to this day.
A. Walker, jr. for Simon Walker.	[L. S.]	Three thousand six hundred and seventy dollars eight cents, includ. int. to this day.
John Rhodes, for Rhodes and Briggs.	[L. S.]	Five thousand four hundred thirty nine dollars ninety-four cts., includ. int. to this day.
Henry Knuckel, for Knuckel & Ruys.	[L. S.]	
Le Roy, Bayard & McEvers, for Brown, Sharps & Co.	[L. S.]	
Joseph Lyon & Co. for James Greenway, jr.	[L. S.]	
John Taylor.	[L. S.]	
Thomas Monkhouse, for Bowerbank, Monkhouse & Co.	[L. S.]	
Thomas, James, and Robert Coleman.	[L. S.]	
John Taylor.	[L. S.]	
John Hobson, for Clegg & Perkhouse.	[L. S.]	
J. Creighton.	[L. S.]	

Endorsed.

"Discharge, August 20th, 1798."

"Read on hearing, 27th and 28th January, 1835."

"J. P., *Register*;"

"No. 3." "Filed, March 3, 1835."

"Read on hearing, October 16th, 1832."

Copy, "J. W., *Clerk*."

JAMES PORTER, *Register*.

In Chancery—Before the Chancellor.

JOHN S. MITCHELL, Ex'or, &c., of Andrew Mitchell, deceased,
vs.
ROBERT LENOX and others.

Depositions of witnesses, produced, sworn and examined, in a certain cause pending in the court of chancery of the State of New York, before the chancellor, wherein John S. Mitchell, executor, &c., of Andrew Mitchell, deceased, is complainant, and Robert Lenox, John Johnston, and James S. Taylor, executors, &c., of John Taylor, deceased, John Day and others, are defendants. On the part of the complainant.

Robert Halliday, a witness produced and sworn on the part of the complainant, testifies as follows:

I reside in the city of New York; am a merchant. I know the complainant, and was acquainted with Andrew Mitchell in his lifetime.

Were you the attorney for Edward Cairns, William Frears, and John Kirmichael?

I was.

Did you sign, seal, and deliver exhibit B, now produced to you, as the attorney for the above named persons?

I did.

Had you full power and authority to do so?

I had—I had a written power of attorney. I presume it is now in my possession; but I do not know now where to find it, in consequence of the lapse of time. I afterwards became a partner with the persons above named, both in New York and Birmingham. The signature of Hay Stevenson is his proper signature, and I saw him execute the paper B. I know Robert Thompson, who is the witness to the paper, and I saw him sign his name there. He is now dead.

ROBERT HALLIDAY.

Subscribed and sworn to, this 12th day of April, 1837, before me,

J. C. HART,
Examiner in Chancery.

On the 26th day of June, 1837, the above witness, Robert Halliday, again appeared before me, and the foregoing deposition being carefully read over by him, he was again sworn to the truth thereof. at the request of the counsel for the complainant.

J. C. HART,
Examiner in Chancery.

William Kent, a witness produced and sworn on the part of the complainant, testifies as follows:

I reside in the city of New York, and am counsellor at law. Was you employed by Greenway & Potter to collect a sum of money from John Taylor, now deceased, and when? My recollection of the transaction is rather defective. I have looked for the papers and memoranda in relation to it, but I have not been able to find them. I was consulted in the early part of 1832, by a young Englishman named Harold Potter, the son of a Mr. Potter, who had been concerned in a mercantile house of this city, the style of which I believe was Greenway & Potter, and which had existed in the city many years previous. All I can recollect distinctly of the claim is this, that it was against Mr. John Taylor, an old Scotch gentleman of this city. I had an interview with him, and with his counsel, Thomas L. Ogden, Esquire, and a correspondence took place between us, and the whole resulted in a payment to Mr. Potter of a sum of money in discharge of the claim, but what the amount was I do not recollect. Do you recollect of calling at the office of John S. Mitchell, Esquire, and examining the answer of the said John Taylor to a

bill filed by the said Mitchell's father against Lenox, Taylor, and others? I recollect of calling at Mr. Mitchell's office and examining some chancery papers, which I believe were of the character mentioned. WILLIAM KENT.

Subscribed and sworn to, this 12th day of April, 1837, before me,
J. C. HART,
Examiner in Chancery.

On the 26th June, the above witness again appears, and reads over his former deposition, taken above, to which he is again sworn, at the request of the complainant, and the direct examination continues, as follows:

Had the claim of Greenway & Potter any relation to the matters stated in the answer of John Taylor, deceased? I have no distinct recollection. I believe it had. What was the nature of the claim, and of how long standing? I can make no additions to my preceding statement, and I have seen no papers, and gained no further information of it. What was your object in examining the answer of John Taylor? To obtain information in relation to the claim.
WILLIAM KENT.

Cross examination.—Was the claim in question against Mr. Taylor, as agent and attorney of Greenway & Potter, or as trustee for the creditors of Andrew Mitchell? I do not recollect; but I think the former. WILLIAM KENT.

Direct examination resumed.—Was not the subject matter in dispute a farm or tract of land on the Susquehanna river, in this State? There was something in the claim relating to the investment of moneys in real estate I think, but I am not certain.
WILLIAM KENT.

Subscribed and sworn to this 26th day of June, 1837, before me,
J. C. HART,
Examiner in Chancery.

James Gulick, a witness produced and sworn on the part of the complainant, testifies as follows:

I am the register in and for the city and county of New York. The witness on being shown exhibit A, on the part of the complainant, and filed with the examiner, says that the same is a correct transcript from the original record, now remaining on file in the office of the register, in and for the said city; and that the name of James Gulick, subscribed to certificate at the end of said document, is the signature of the witness. JAMES GULICK.

Subscribed and sworn to, this 12th day of April, 1837, before me,
J. C. HART,
Examiner in Chancery.

The counsel for the complainant files this day with the examiner, exhibit marked D, and it is agreed by counsel, that the second production of James Gulick, as a witness in this cause, shall be dispensed with, and the paper A is thereupon admitted to be an exemplified copy of the original record therein referred to.

June 26th, 1837.

J. C. HART,
Examiner in Chancery.

IN CHANCERY.

Before the Chancellor.

JOHN S. MITCHELL, executor, &c. of Andrew Mitchell, deceased,
vs.
ROBERT LENOX and others.

I certify that the foregoing is a true copy of the depositions taken on the part of the complainant in the above entitled cause.

J. C. HART,
Examiner in Chancery.

IN CHANCERY.

Before the Chancellor.

JOHN S. MITCHELL, executor, &c. of Andrew Mitchell, deceased,
vs.
ROBERT LENOX and others.

A.

Recorded for and at the request of Mr. Robert Lenox, this 27th day of April, 1812, at 2 o'clock, P. M.

This indenture, made the twentieth day of January, &c. (This assignment is the same as the copy annexed to the bill, and inserted in page 25.)

I, James Gulick, register for the city and county of New York, do hereby certify, that I have compared the preceding instrument, with the original record of the same recorded in the said office of register, in liber 98, page 259 of conveyances, and the same is a correct transcript therefrom, and of the whole of such original record.

New York, April 12th, 1837.

JAMES GULICK,
Register.

B.

To all to whom these presents shall come, or may in any wise concern, Edward Cairns, William Frears, and John Kirmichael, and Hay Stevenson, send greeting: Whereas Andrew Mitchell, of the city of New York, in the State of New York, merchant, being unable to pay and satisfy all his debts, hath, with the consent and approbation of his creditors, conveyed and assigned all his estate, both real and personal, his household goods and furniture excepted, unto Robert Lenox, Hay Stevenson, and John Taylor, of the said city, merchants, in trust for the benefit of his creditors; and whereas the said Edward Cairns, William Frears, and John Kirmichael, are also creditors of the said Andrew Mitchell, and are equally entitled with the other creditors to the benefit of the said conveyance and assignment. And whereas, the said Andrew Mitchell, on the tenth day of January, 1798, did execute unto the said Hay Stevenson, a bond for the payment of £800, with lawful interest, on or before the 10th day of July next ensuing the date thereof, and also a mortgage bearing date the said tenth day of January, in the said year 1798, for securing the payment of the said bond. And whereas the said bond and mortgage, before the conveyance and assignment aforesaid, was delivered over to the said Edward Cairns, William Frears, and John Kirmichael, by the said Hay Stevenson, and became their property, as a security for the payment of a debt due and owing from the said Andrew Mitchell, to the said Edward Cairns, William Frears, and John Kirmichael, under the firm of Cairns, Frears and Kirmichael. Now, therefore, know ye, that the said Edward Cairns, William Frears, and John Kirmichael, and Hay Stevenson, for and in consideration of the premises, and also for and in consideration of the sum of one dollar, to them respectively in hand well and truly paid by the said Andrew Mitchell, at or before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have, and each of them hath remised, released, and for ever discharged, and by these presents do, and each of them doth, for themselves, and each of them, and for their and each of their executors and administrators, remise, release, and for ever discharge the said Andrew Mitchell, his heirs, executors and administrators, of and from all actions and suits, cause and causes of action and suits, accounts, reckonings, debts, dues, claims and demands, whatsoever, in law and equity, prior to the day of the date of these presents; saving always, and reserving to the said Edward Cairns, William Frears, and John Kirmichael, and Hay Stevenson, or either of them, and their executors and administrators, or the executors and administrators of either of them, the right to take and pursue all legal measures to compel a sale (for the proper use and behoof of the said Edward Cairns, William Frears, and John Kirmichael,) of the lands and tenements granted by the mortgage aforesaid, so as that the said Andrew Mitchell, his heirs, executors, or administrators, shall not be personally liable, or responsible for the sum or any part thereof, in which the nett proceeds of the sale of the

said lands and tenements, shall fall short of paying the said sum of eight hundred pounds as aforesaid, with the interest thereupon. And the said Edward Cairns, William Frears, and John Kirmichael, and Hay Stevenson, for themselves and each of them, and for their and each of their heirs, executors and administrators, do hereby covenant and agree with the said Andrew Mitchell, his executors and administrators, that in case the nett proceeds of the sale of said lands and tenements shall be more than sufficient to pay the said sum of £800, with interest, then and in such case, the said Edward Cairns, William Frears, and John Kirmichael, and Hay Stevenson, or one of them, shall and will pay over to the said Robert Lenox, Hay Stevenson, and John Taylor, trustees as aforesaid, for the general benefit of all the creditors of the said Andrew Mitchell, the surplus money remaining from the nett proceeds of the said sale.

In witness whereof, the said Edward Cairns, William Frears, and John Kirmichael, by their attorney, Robert Halliday, and the said Hay Stevenson, have hereunto set their hands and seals, this twentieth day of May, in the year of our Lord one thousand seven hundred and ninety-nine.

EDWARD CAIRNS, [L. S.]
WILLIAM FREARS, [L. S.]
JOHN KIRMICHAEL, [L. S.]
By their attorney, ROBERT HALLIDAY.
HAY STEVENSON. [L. S.]

Sealed and delivered in presence of (the words "this twentieth day of May, in the year of our Lord," first written on an erasure.)
ROBERT THOMPSON.

IN CHANCERY.

Before the Chancellor.

JOHN S. MITCHELL, executor, &c. of Andrew Mitchell, deceased, *vs.* ROBERT LENOX and others. } Exhibits.

I certify that the foregoing is a true copy of the exhibits, on the part of the complainant, in the above entitled cause.

J. C. HART,
Examiner in Chancery.

At a court of chancery held for the State of New York, at the city of New York, on the twenty-fourth day of October, one thousand eight hundred and thirty-six:

Present: REUBEN H. WALWORTH, *Chancellor.*

JOHN S. MITCHELL, executor of the last will and testament, and devisee of Andrew Mitchell, deceased,
vs.
ROBERT LENOX, and JOHN JOHNSON, and JAMES S. TAYLOR, executors of the last will and testament of John Taylor, deceased, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, Susan Mitchell, Ann Mitchell, Cornelia Mitchell, Eliza Mitchell, and George Mitchell.

A bill in the nature of a bill of revivor having been filed in this cause against the above named defendants, and an answer having been put in to such bill by Ann Mitchell, Cornelia Mitchell, and Eliza Mitchell, three of the devisees of Andrew Mitchell, deceased, submitting to such revival, and an order having been entered, taking the bill as confessed by Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, and by Susan Mitchell and George Mitchell, two of said devisees of Andrew Mitchell, deceased; and that subsequently to such order, answers to such bill having been put in by Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, also submitting to such revival; thereupon, on reading an affidavit of John S. Mitchell, the above named complainant, and notice of this motion and due proof of service thereof upon R. H. Ogden, Esq., solicitor for the said defendants, Robert Lenox, and John Johnston, and James S. Taylor, executors of John Taylor, deceased, and Franklin Brown, Esq., solicitor for Susan Mitchell, Ann Mitchell, Cornelia Mitchell, Eliza Mitchell, and George Mitchell, and on motion of John S. Mitchell, the said complainant, it is ordered that this cause do stand absolutely revived against the said Robert Lenox, and John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank,

Monkhouse and Company, and Clegg and Perkhouse, Susan Mitchell, Ann Mitchell, Cornelia Mitchell, Eliza Mitchell, and George Mitchell, and be in the same plight and condition as it was at the death of the said Andrew Mitchell.

(Copy.) JOHN WALWORTH, *Clerk.*

STATE OF NEW YORK, *in Chancery:*

The separate answer of Robert Lenox, one of the defendants, to the bill of complaint exhibited against him, together with John Johnston, James S. Taylor, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the several persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, by Andrew Mitchell, complainant:

This defendant, saving and reserving to himself all benefit of exception to the manifold insufficiencies of the said complaint, for answer thereunto, or unto so much and such parts thereof as he is advised that it is material for him to answer unto, he doth answer and say, that he believes it to be true, and doth admit that some time in or about the month of January, in the year of our Lord one thousand seven hundred and ninety-eight, the complainant executed, under his hand and seal, a deed of assignment, thereby granting, conveying, and assigning unto this defendant, and to Hay Stevenson, and John Taylor, since deceased, and to the survivors and survivor of them, all his real and personal estate both in law and equity, in possession, reversion, and remainder, and all his books, vouchers, and securities relating to the same, upon the trusts, and for the purposes therein specified, which trusts, as this defendant believes and admits, are substantially set forth in the said bill; that the original of the said deed is in the possession, or under the control of the defendant, John Day, the surviving trustee of the said estate, and not of this defendant; and for greater certainty as to the contents thereof, this defendant craves leave to refer to the said deed, when the same shall be produced to this honorable court.

And this defendant further answering, doth admit that Margaret, the wife of the complainant, did, by such deed as is mentioned in the said bill, release to the said John Taylor, Hay Stevenson, and this defendant, and to the survivors of them, and to the heirs and executors of such survivor, all her right and interest to and in the said estate of the said complainant, upon the trust and for the purposes expressed in the said deed of assignment so made and executed by the complainant, the original of which deed of the said Margaret is, as this defendant believes, also in the possession and under the control of the said John Day, and this defendant in like manner craves leave to refer thereto. And this defendant doth believe and admit that each of the said deeds was recorded, as is charged in the said bill of com-

plaint. And that the complainant, at the date of the said first mentioned deed, was indebted to various persons in divers sums of money which he was then unable to pay, and that several suits had been commenced against him for the recovery of the same, and that the complainant was then possessed of a considerable estate, real and personal, of the amount of which debts, and of the value of which estates this defendant is ignorant, but according to his best knowledge and belief, such estate was wholly inadequate to the payment of the complainant's debts, and could not by any species of management have been made sufficient to pay the same.

And this defendant, further answering, saith, that, according to the best information and belief of this defendant, the complainant retained possession of his books of account, evidences of debt, and other personal property, for a considerable time after the date of the said deed of assignment, and during that time continued in the receipt and collection of the monies due to him; and, out of the monies so collected, paid divers debts due from him to the United States, and other debts to a large amount; and that afterwards, and some time in or about the month of April, in the year one thousand seven hundred and ninety-nine, the complainant delivered to the said John Taylor various deeds of conveyance, notes, and obligations.

And this defendant believes and admits, that, in pursuance of the directions of the said trustees, the complainant delivered his books of account to David A. Ogden, their attorney and legal adviser, and was by them instructed to proceed in the collection of the debts due to the said estate; but what deeds, notes, obligations, books of account, or other documents or vouchers, were so delivered to the said John Taylor and David A. Ogden, or to either of them, and as to the dates of the said deeds, the names of the grantors, the number of acres contained in, or the situation of the several parcels of land thereby granted, this defendant is ignorant, and unable to answer; and, as to any receipts or acknowledgments which may have been given by the said John Taylor in respect to the said deeds, notes, or obligations, books of account, or any of them, this defendant has no knowledge or information, otherwise than from the contents of the said bill, and craves leave to refer to the said receipts and acknowledgments when produced to this honorable court; and this defendant admits the death of the said Hay Stevenson and John Taylor, as charged in the said bill, and that John Johnston and James S. Taylor are executors of the last will and testament of the said John Taylor, deceased.

This defendant, further answering, saith, that he believes and admits, that several of the complainant's creditors did execute to him a discharge and release in writing, in compliance with the terms of the said deed of assignment, but at what time they executed the same, and as to their names, and in what amounts the complainant was indebted to them respectively, and whether Anthony Blenon, Robert M. Wellman, and James Creighton, in the said bill named, did severally execute such assignments as are mentioned in the said bill, and

whether the complainant made any settlement with the said James Creighton, as is therein also mentioned, this defendant is ignorant, and unable to answer; and this defendant is also ignorant as to the bond and mortgage mentioned in the said bill to have been given by the complainant to the said Hay Stevenson, and of the covenant therein mentioned, to have been given to this defendant, and the said Hay Stevenson and John Taylor, by Edward Cairns, William Frears, and John Kirmichael, and is wholly unable to make any answer to the allegations contained in the said bill, respecting the said bond, mortgage, and covenant, if any such were given or made.

This defendant, further answering, saith, that he has no knowledge or recollection of the debt mentioned in the said bill, to have been due from the complainant to Robert C. Johnson, nor of the mortgage therein mentioned, to have been given by the complainant to the said Robert C. Johnson, to secure the payment of the said debt, nor of the land embraced in the said mortgage, nor of the amount of the purchase money of the said land, nor of the portions thereof paid in money, and secured by such mortgage of the said land; neither doth he recollect or know when, or how, or at what price, the said land was sold; and this defendant is ignorant, and unable to state what information concerning the said mortgage may have been given, and what request concerning its payment may have been made by the complainant to the said John Taylor; that the said lands were not redeemed from the said mortgage, to the knowledge or belief of this defendant, and that this defendant was not, nor to his knowledge or belief, were the said John Taylor, Hay Stevenson, or either of them, provided with funds for the redemption of the same; and whether the said mortgaged premises were sold under a foreclosure of the said mortgage, or, if sold, at what price, or how—if otherwise, the said premises may have been sold and disposed of—this defendant is ignorant, and unable to answer. And this defendant further saith, that he has no knowledge or recollection of the mortgage mentioned in the said bill to have been held by Galbreath & Elmes, nor of the tract of land therein stated to have been covered by such mortgage, nor of the debt thereby secured, or intended to be secured, and is, therefore, unable to answer, in these particulars, the allegations of the said bill; and, as to the bond and mortgage mentioned in the said bill to have been given by the complainant to the said John Taylor, to secure a debt due from the complainant to the firm of Greenway & Potter. And this defendant, further answering, saith, that sometime in or about the year of our Lord one thousand seven hundred and ninety-nine, a bill of complaint was filed in this court by the said John Taylor, against the complainant; also against this defendant and the said Hay Stevenson, for a sale of the tract of land embraced by the said mortgage; and such proceedings were thereupon had, that, by virtue of a decretal order of this court, made on or about the seventh day of May, in the year of our Lord one thousand seven hundred and ninety-nine, the said mortgaged premises were sold by, or under the direction of James M. Hughes, then one of the masters of

this court, to William Wilson, of the city of New York, he being the highest bidder for the same; and thereupon the said James M. Hughes, in pursuance of the said sale, by indenture bearing date the second day of July, in the year one thousand seven hundred and ninety-nine, (and in which indenture this defendant and the said John Taylor, and Hay Stevenson were, by the said order, required to join, and did join as parties,) granted and conveyed to the said William Wilson, all and singular the said mortgaged premises therein described, as situate on the westerly side of the Susquehanna river, in the town of Chemung, and county of Tioga, and State of New York, and as part of a tract of eight thousand acres of land located by Peter W. Yates, Jacob Ford, Wheeler Douglass, and Isaac Fonda, and as known and distinguished by lots numbers four, eleven, thirteen, and fifteen, (4, 11, 13, 15,) containing, together, one thousand nine hundred and ninety-seven acres of land, as in and by the said indenture, in the possession of the executors of the said John Taylor, and to which, for greater certainty in the premises, this defendant craves leave to refer, may appear. That by the recitals contained in the said indenture, it appears that the said premises were sold and conveyed to the said William Wilson for the sum of one thousand and forty dollars and ten cents, and that the amount reported to be due to the said John Taylor, on the said mortgage, was six thousand one hundred and thirty-nine dollars and six cents; and this defendant believes such to be the truth of the case, and that the said premises were so mortgaged to the said John Taylor, as the agent of the firm of Greenway & Potter, and to secure a debt due to them from the complainant; and that this defendant has no knowledge or information of any real estate which was mortgaged by the complainant to the said John Taylor, other than the premises sold as aforesaid, to the said William Wilson, and is unable, otherwise, to answer the allegations of the said bill, in respect to the said tract of land, or as to the disposition or appropriation thereof by the said John Taylor, nor as to the debt of the complainant to the said Greenway & Potter, or the securities therein mentioned to have been given for the payment of such debt.

This defendant, further answering, saith, that he has no knowledge of, or information concerning the certificates for two shares in the stock of the Western, and one share in the stock of the Northern Inland Lock Navigation Companies, referred to in the said bill, except that he understood, and so believed, and still believes, that the complainant, previously to the execution of the said first-mentioned deed of assignment, had been entitled to the said shares, and that they were afterwards found to be forfeited, and of no value, and that nothing was realized therefrom for the benefit of the complainant's creditors; and, as to the land warrants mentioned in the said bill, this defendant has no knowledge, information, or recollection whatever. That he was informed, and believes, that the complainant delivered to the said John Taylor a lease for certain stables situate in Maiden Lane, in tne city of New York, and that the said lease was sold by the said John Taylor at public auction, but when, and for what sum,

this defendant doth not know, and cannot now recollect, and is unable to answer; and this defendant doth deny that the said certificates, land warrants, or lease, or any of them, or any papers or documents concerning the same, or any of them, were ever delivered to, or came to the hands of this defendant.

This defendant, further answering, saith, that he is wholly ignorant as to the amounts of the debts which were due to the complainant on the twentieth day of January, one thousand seven hundred and ninety-eight, or at any other time, and whether the complainant was, on that day or at any other time, a creditor of the firm of Peter Fearchild and Company; whether the said firm conveyed any real estate to James Scott, and Peter McDougal; and whether any, and what interest in the said estate was assigned by the complainant to this defendant, and to the said John Taylor and Hay Stevenson, this defendant is also ignorant and unable to answer.

This defendant, further answering, saith, that the said Hay Stevenson departed this life, according to this defendant's best recollection and belief, sometime in or about the fall of the year one thousand seven hundred and ninety-nine; that no division or distribution of the said trust estates, or of any moneys thence arising, had then been made by the said Hay Stevenson, John Taylor, and this defendant, or was afterwards made by this defendant and the said John Taylor, or by any or either of them, among the complainant's creditors, or any of them; and that certain of the complainant's creditors, appearing anxious to have the affairs of the said trust estate brought to a close, and this defendant seeing no means by which this object could be accomplished, so as to realize in any degree the expectations held forth by the complainant, as well in the said deed of assignment, or otherwise, suggested the appointment of other trustees, to be nominated by the creditors, which suggestion was finally adopted and acted on, and at a general meeting of the complainant's creditors, held some time previous to the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and eleven, it was agreed to proceed to the appointment of other trustees of the said estate; and thereupon James McEvers, one of the commercial firm of Leroy, Bayard and McEvers, then of the city of New York, merchants, the said David A. Ogden, and John Day, one of the commercial firm of Ferguson and Day, then of the same city, merchants, were nominated by the said creditors, as trustees to accept and receive from this defendant and the said John Taylor an assignment of the estate of the complainant, upon the trusts expressed in the said original deed of assignment, of the twentieth of January, one thousand seven hundred and ninety-eight. That by some oversight or casualty the evidence of the proceedings of the said meeting was lost or mislaid, in consequence of which a written paper or instrument intended to show the assent of the creditors to such assignment by this defendant, and the said John Taylor to the said James McEvers, David A. Ogden, and John Day, dated the twenty-sixth day of June, in the year one thousand eight hundred and eleven, and

purporting to testify such assent, was afterwards prepared and subscribed by several of the said creditors; and the complainant also expressed his assent to the said assignment by writing under his hand, at the foot of the said written paper or instrument, which paper was thereupon delivered to this defendant, and the said John Taylor, or to one of them for the benefit of both, as in and by the said written paper or instrument in the possession of the executors of the said John Taylor, and to which for greater certainty this defendant craves leave to refer, may more fully appear.

And this defendant further saith, that in pursuance of the said nomination and assent, an indenture bearing date the eighth day of February, in the year of our Lord one thousand eight hundred and twelve, purporting to be made between the complainant of the first part, the said John Taylor and this defendant of the second part, and the said James McEvers, David A. Ogden and John Day of the third part, was prepared and submitted to and approved by counsel; by which indenture, after therein reciting the said first mentioned deed of assignment and the trusts thereby declared, and that after the making of the same, the debts due to the United States and the said Hay Stevenson had been paid and satisfied, and that the several creditors of the complainant had come in under the said assignment, and granted the complainant a general release and discharge; and after also therein reciting the death of the said Hay Stevenson, and that the said John Taylor and this defendant were desirous to resign the trust committed to them as aforesaid, and had signified their wish that other assignees should be appointed in their place; and that at a meeting of the creditors of the complainant, convened for that purpose, the said James McEvers, David A. Ogden and John Day were nominated and appointed such assignees in the place and stead of the said John Taylor and this defendant, it was witnessed that the said John Taylor and this defendant, for the considerations aforesaid, and also in consideration of one dollar to them in hand paid by the said James McEvers, David A. Ogden, and John Day, the receipt whereof was thereby acknowledged, and by and with the consent and approbation of the complainant thereby testified, did grant, bargain, sell, release, convey, and assign to the said James McEvers, David A. Ogden, and John Day, all and singular the estate, real and personal, both in law and equity, in possession, reversion or remainder, which was of the complainant at the date of, and which passed by the said therein recited indenture, excepting only certain household furniture, and other effects therein mentioned to have been given and granted to the complainant, in and by the said general release and discharge; and all his books, vouchers, and securities relating to the same, and also all the estate, right, title and interest of them, the said John Taylor and this defendant, and of him the said complainant, of, in, and to, every part thereof, excepting as is above mentioned. To be had and holden unto the said James McEvers, David A. Ogden, and John Day, their heirs, executors, administrators and assigns forever, as joint tenants, and not as tenants in common, upon trust to

grant, bargain, sell, and dispose of the same in the manner therein and hereinafter expressed and contained, and the moneys arising from such sales, and other the moneys which should be collected and received in virtue of the said deed of assignment, to pay, apply, and dispose of in the manner following, that is to say: in the first place, to pay and discharge all claims and demands against the said James McEvers, David A. Ogden, and John Day, by reason or means of the said trust, together with a reasonable and just compensation for their services; and secondly, to pay and distribute the residue of the said moneys equally and rateably among such of the creditors of the complainant, at the date of the first recited assignment, as had or should under the terms thereof become entitled thereto; and in and by the said indenture, it was further witnessed, that full power and authority was thereby granted to the said James McEvers, David A. Ogden, and John Day, or any two of them, and the survivors or survivor of them, and the heirs, executors, or administrators of such survivor, by all lawful ways and means to collect and receive all and singular the debts and sums of money which were due, payable, or belonging to the complainant at the time of the said assignment, or which were then due, payable or belonging to the said John Taylor and this defendant, as such his assignees, and the same to compound, compromise, and agree, and for the same to give and grant good and sufficient discharges, and also to sell and dispose of all and singular the lands and other real estate of the complainant, so assigned as aforesaid, at public or private sale, and upon such credit or terms of payment as to them, the said James McEvers, David A. Ogden and John Day, should appear best, and to constitute and appoint subordinate attorneys, with the like or more limited powers; and that after paying and discharging all the debts so due from the complainant, and all his expenses and charges attending the execution of the said trusts, that they the said James McEvers, David A. Ogden, and John Day, and the survivors and survivor of them, should pay to the complainant, his executors, administrators or assigns, what should appear, on a fair account, stated to be remaining in his or their hands over and above the said debts, charges and expenses; and that they should also reconvey and re-assign to the complainant, his heirs, executors, administrators, or assigns, all such property or debts thereby assigned as should be then not conveyed, unreceived, or unaltered, if any such there should be, as in and by the said last mentioned indenture, remaining in the possession and under the control of the said John Day, and to which, for greater certainty in the premises, this defendant craves leave to refer, may more at large appear.

This defendant, further answering, saith, that the said last mentioned indenture was duly executed by the said John Taylor, and by this defendant, and that its execution by each was duly proved before Benjamin Ledyard, then one of the masters of this court, on the twenty-first day of April, in the year of our Lord one thousand eight hundred and twelve, and that on the thirtieth day of the same month it was recorded in the secretary's office of the State of New

York, in book of deeds MRR, page two hundred and three, and on the thirty-first day of May, in the year one thousand eight hundred and thirteen, in the clerk's office of the county of Chenango, in liber O of deeds, page two hundred and thirteen, as by the records of the said several offices may appear.

And this defendant, further answering, saith, that the said last mentioned indenture was prepared under the advice of counsel, specially employed on behalf of this defendant and the said John Taylor, and until the filing of the bill of complaint, hereinafter mentioned to have been first exhibited in this court by the complainant against this defendant and the said John Taylor, this defendant supposed that the said last mentioned indenture had been executed by all the necessary and proper parties thereto. Nevertheless, it appears upon an inspection of the said indenture, that although the complainant is therein described as a party thereto, and its execution by him had been contemplated by the said counsel, yet that it had not been executed by the said complainant; this defendant is unable to account for the complainant's omission to execute the said indenture; but this defendant doth expressly aver, that the complainant was privy to the resignation of the old, and to the nomination of the said new trustees, and to the execution by this defendant and the said John Taylor of the said last mentioned indenture, and fully assented thereto, and has always approved of and acquiesced in such change of trustees, and in such assignment of the said trust estates to the said James McEvers, David A. Ogden, and John Day.

This defendant, further answering, saith, that upon the execution of the said last mentioned indenture of assignment by this defendant and the said John Taylor, the books of account, notes, obligations, vouchers, securities, title deeds, and documents, appertaining or belonging to the said trust estate, were, as this defendant has always understood, and as he believes, handed over to the said James McEvers, David A. Ogden, and John Day, or some or one of them; and this defendant expressly avers, that they, or the survivors or survivor of them, have ever since been in the possession of the same, and charged with the care, management and disposition of the said trust estates; and in the execution of the trusts created by the said indenture, have proceeded in the collection of the debts thereby assigned, and in the sale and disposition of the real estate thereby conveyed, and also in the distribution among the complainant's creditors, of the moneys arising from the said trust estates, and that the said trusts are still in a course of execution by the said John Day, now the sole surviving trustee of the said estate, the said James McEvers and David A. Ogden having both departed this life.

This defendant, further answering, saith, that since the assignment of the said trust estate by this defendant, and the said John Taylor, to the said James McEvers, David A. Ogden, and John Day, as above set forth, this defendant hath not, nor, to the best of his knowledge and belief, hath the said John Taylor, at any time, or in any wise interfered with the management of the said trust estates. That

during the existence of the trusts created by the said first mentioned deed of assignment, the said John Taylor assumed the active management of the said estates, and kept the cash and other accounts relating thereto. That no part of the real estate conveyed by that deed was sold by this defendant and the said Hay Stevenson and John Taylor, or either of them, to the knowledge or belief of this defendant; and that no moneys whatever, arising from the said trust estates, have ever come to the hands, use or control of this defendant; and as to such as may have come to the hands of the said John Taylor, and as to the application of the same, this defendant is ignorant and unable to answer.

And this defendant, admitting that no account of the said trust estates has ever been rendered by him to the complainant, doth aver that he was never called on for such account, or otherwise in any manner questioned by the complainant in relation to the said estate James from the time of the said assignment to the said David A. Ogden, McEvers, and John Day, until the date of the two letters mentioned in the said bill to have been addressed by the complainant to this defendant and the said John Taylor, in the year one thousand eight hundred and thirty, and of which this defendant admits the receipt. And this defendant further admitting that none of the mortgaged lands conveyed by the said first mentioned assignment were redeemed, to the knowledge or belief of this defendant, and that no interest was paid on the sums for which they were mortgaged, doth humbly insist that this defendant and the said John Taylor were not bound to redeem the said lands, or to pay the said interest.

This defendant, further answering. saith, that from the time of the assignment of the said trust estates to the said David A. Ogden, John Day, and James McEvers, herein before mentioned, they or the survivors or survivor of them, have had and exercised, and were known by the complainant to have and exercise the exclusive charge, management, care, and control of the said trust estates, and in the execution of their trust have sold and disposed of various portions of the said estates, and collected divers sums of money thence arising, and have made various divisions of the said moneys among the complainant's creditors; and this defendant believes and admits that the complainant, as assignee of the two creditors named in his said bill, has, at the several times therein mentioned, received the several sums therein specified on account of the debts due to such creditors, and that such sums were paid out of the moneys arising from the said trust estate, all which sums, as this defendant expressly avers, were so received by the complainant from the said David A. Ogden, John Day, and James McEvers, or the survivors or survivor of them, as the then assignees and trustees of the said estate, acting in the due and regular execution of their trusts under the assignment so made to them as aforesaid, and long after the trust originally assumed by this defendant and the said John Taylor, was by means of such assignment, and by the complainant was known to have terminated.

This defendant, further answering, saith, that the said James

McEvers and David A. Ogden are now both dead, and the said trust estates, so far as they may not have been converted into money, and divided among the said creditors, or otherwise applied to the purposes of the said trust, continue under the care, management, and charge of the said John Day, as survivor of the said James McEvers and David A. Ogden, and remain to be accounted for by him; and that this defendant has no knowledge of, and is wholly unable to render any further or other account of or concerning the same, but this defendant has always understood, and doth believe that the said trust estates have been found to be, and are wholly insufficient for the payment of the debts due to the complainant's creditors, for the satisfaction of which the said estates were assigned as aforesaid.

And this defendant, further answering, doth deny that he, this defendant, and the said John Taylor, or to the best knowledge or belief of this defendant, that either of them have or has been guilty of any gross neglect in the management of the said trust estates, or have or has converted any part of the said estates to their or either of their own use. And this defendant doth also deny that he, or to his knowledge or belief that the said John Johnston and James S. Taylor, as executors of the last will and testament of the said John Taylor, deceased, are indebted to the complainant in any manner or on any account whatever.

And this defendant doth humbly submit that the assignment and conveyance of the said trust estates, herein before mentioned to have been made by this defendant and the said John Taylor to the said David A. Ogden, John Day, and James McEvers, was and is valid and effectual, and that this defendant and the said John Taylor were thereby released and discharged from the further execution of the trust created by the said first mentioned deed of assignment, and ought not to be called in question as to any account or disposition of the said trust estates, subsequent to such assignment thereof to the said David A. Ogden, John Day, and James McEvers, and that under the circumstances of the case, the complainant is not entitled as against this defendant, and the said John Johnston and James S. Taylor, to the relief and discovery sought by his said bill of complaint.

And this defendant, further answering, saith, that heretofore, to wit, on the fifteenth day of April, in the year one thousand eight hundred and thirty, the complainant exhibited his amended bill of complaint in this court against this defendant and the said John Taylor, and afterwards amended the same by adding as parties defendants the said Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and brothers, Rhoades and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, which bill was for the same matter, and to the same effect, and for the like relief and purpose as the complainant doth in and by his said present bill set forth. And this defendant and the said John Taylor, having been severally served with process of subpœna for that purpose, severally appeared an

put in their several answers to the said amended bill, therein among other things setting forth the said deed of assignment and conveyance of the said trust estates to the said David A. Ogden, John Day, and James McEvers, and the acceptance by them of the trusts therein mentioned; and as to the others of the defendants named in the said bill, the same was taken as confessed. That the complainant replied to the answers of this defendant and the said John Taylor, and as to them, the said suit being at issue, witnesses were examined therein, and upon hearing of the said cause on the merits thereof in this court before the vice chancellor of the first circuit, it was, by a decretal order of the said court, made on the fourteenth day of January, in the year one thousand eight hundred and thirty-three, adjudged and decreed that the said bill of complaint should be dismissed with costs, the vice chancellor being of opinion that this defendant and the said John Taylor were liable only in respect to the proceeds of the said trust estate, which came to their hands prior to the said deed of assignment so made by them to the said James McEvers, David A. Ogden, and John Day, and that the account thereof could only be taken in connexion with the account of them, the said second trustees or the survivor of them, in order to which it was directed by the said decretal order that the said dismissal should be without prejudice to the complainant's right to make this defendant and the said John Taylor parties to a new bill against the said second trustees, from which decree the complainant appealed to the chancellor of the State of New York, after which the said John Taylor departed this life, and the said suit and proceedings were revived against the said John Johnston and James S. Taylor, the executors of his last will and testament, and afterwards the said appeal was heard in this court before the chancellor; and thereupon, by a decree of the said court made before the chancellor at the city of Albany, on the third day of March, in the year one thousand eight hundred and thirty-five, it was ordered, adjudged, and decreed that the said decree so appealed from should be, and the same thereby was affirmed; and afterwards, the complainant appealed and presented his petition of appeal, thereby appealing from the said last mentioned decree to the honorable the president of the senate, the senators, and the judges of the supreme court of judicature of the people of the State of New York, in the court for the correction of errors, and this defendant and the said John Johnston and James S. Taylor put in their answers to the said petition, and the said appeal was afterwards heard in the said court for the correction of errors; and thereupon, by an order and decree of the said last mentioned court, made at the city of Albany on the thirtieth day of December, in the year one thousand eight hundred and thirty-five, it was ordered, adjudged and decreed, that the said decree of this court so made by the chancellor, and so appealed from, should be in all things affirmed, and that the said cause and proceedings should be remitted to the court of chancery, and the same were so remitted, and by an order of the said court of chancery, made at Albany on the fifth day of February, in the year one thousand eight

hundred and thirty-six, it was ordered that the said remittitur should be received and filed in that court, and the said decree of the said court for the correction of errors was thereby made and declared to be an order or decree of this court, as in and by the several pleadings and proceedings aforesaid, remaining as of record in this honorable court, may appear; and this defendant avers that the said several decrees remain in full force and effect, and that the account and relief prayed by the complainant's present bill, and the claims and demands thereby controverted and sought to be established against this defendant and against the said John Johnston and James S. Taylor, and the account and relief prayed by the complainant's said former bill, and the claims and demands thereby controverted and sought to be established against this defendant and against the said John Johnston and James S. Taylor, are the same, and not other or different; wherefore this defendant claims and insists on the benefit of the said former suit and proceedings, and of the said several decrees therein, in like manner, and with the like effect, as if the same were by him pleaded in bar of the present bill of the complainant; and this defendant denies all and all manner of combination and confederacy, charged in the said bill of complaint, without that any other matter or thing therein contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready to aver, maintain and prove, as this honorable court shall direct, and humby prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully and unjustly sustained.

(Signed) ROBERT LENOX.
(Signed) R. H. OGDEN, *Sol'r for Def't.*
T. L. OGDEN, *of Counsel for Deft.*

CITY AND COUNTY OF NEW YORK, *ss.*

The above-named defendant, Robert Lenox, was on this ninth day of March, A. D. 1836, sworn before me; that he had heard the foregoing answer read, and knew the contents thereof; that the same is true of his own knowledge, except as to the things therein stated to be on his information and belief, and as to these he believes it to be true.

(Signed) D. HOBART,
Commissioner of Deeds.

STATE OF NEW YORK, }
IN CHANCERY. }

The separate answer of John Johnston and James S. Taylor, executors of the last will and testament of John Taylor, deceased, to the bill of complaint exhibited against them, together with Robert Lenox, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several

firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, by Andrew Mitchell, complainant.

The defendants saving and reserving to themselves all benefit of exception to the manifold insufficiences of the said bill of complaint, for answer thereunto, or unto so much and such parts thereof as they are advised that is material for them to answer, they do answer and say, that they believe and admit, that some time in or about the month of January, in the year of our Lord one thousand seven hundred and ninety-eight, the complainant executed, under his hand and seal, a deed of assignment to Robert Lenox, of the city of New York, and to Hay Stevenson and John Taylor, then of the same place, since deceased, to the effect mentioned and set forth in the said bill, but for the particular contents of said deed, these defendants crave leave to refer thereto when the same shall be produced to this court. And these defendants do also believe and admit that Margaret, the wife of the complainant, did, by such deed as is mentioned in the said bill, release to the said Robert Lenox, Hay Stevenson, and John Taylor, and to the survivors and survivor of them, and to the heirs and executors of such survivor, all her right and interest to and in the estate of the said complainant, upon the trusts and for the purposes expressed in the said first mentioned deed of assignment, and that each of the said deeds was recorded at the time and place for this purpose mentioned in the said bill, and that the complainant delivered to the said Robert Lenox, John Taylor, and Hay Stevenson, or to their counsel by their directions, various deeds of conveyance, notes and obligations, vouchers, papers and books of account, relating to the said trust estates; but as to the particulars thereof, and to whom, individually, the same were delivered, and on what, or whose receipts or acknowledgments, these defendants are ignorant and unable to answer, further or otherwise than is hereinafter stated and answered; and these defendants are ignorant, otherwise than from the allegations of the said bill, of the dates and contents of the several schedules marked B and C, annexed to the said bill, and for greater certainty, crave leave to refer thereto when they shall be produced and proved to this honorable court.

And these defendants, further answering, admit the death of the said Hay Stevenson, and of the said John Taylor, as charged in the said bill, and they believe, and also admit, that certain of the creditors of the complainant did execute to him a discharge and release in writing, but as to the date and contents thereof, whether made in compliance with the terms of the said first mentioned deed of assignment, how many or which of the said creditors executed such discharge and release, whether the original thereof is now on file in the office of the register of this court, and whether Anthony Blenon, Robert M. Wellman, and James Creighton, in the said bill named, did severally execute such assignment and transfers as are mentioned in the said bill of complaint, or any other assignment or transfer, and

whether the complainant made any payment to, or settlement with the said James Creighton, these defendants are ignorant and unable to answer.

These defendants, further answering, say, that whether the complainant, previously to the execution of the said first mentioned deed of assignment, or at any other time, had executed any bond and mortgage to the said Hay Stevenson, to secure a debt due to the house of Cairns, Frears, and Carmichael, whether such bond and mortgage were delivered to them by the said Hay Stevenson, and whether they covenanted to pay over to the said Robert Lenox, Hay Stevenson, and John Taylor, the surplus money arising from the sale of the land thereby mortgaged; whether at the time of the date of the said assignment, the complainant was indebted to Robert C. Johnson, in a large or any sum of money, how the debt accrued, how, if at all, payment of it was secured; if by mortgage of lands, what was the amount of the purchase money of the said land, what part thereof had been paid by the complainant, and what was the balance of such purchase money intended to be secured by the said mortgage; whether the complainant at the time of the delivery of the deed of conveyance for the said lands to the said John Taylor, informed him of the said mortgage, and requested him to have it paid out of moneys collected from the estate of the complainant, or otherwise, and whether the mortgaged premises were sold under a foreclosure of the said mortgage by the said Robert C. Johnson or otherwise; and if sold, at what price, and whether for a small or large sum, and whether Galbreath and Elmes at any time held any mortgage on a tract of land of Lake Champlaim, these defendants are also ignorant and unable to answer.

These defendants, further answering, say, that they have understood and believe, that the complainant was indebted to the firm of Greenway and Potter in the said bill of complaint named, but in what amount they are unable to state, and that, to secure the payment of such debt with interest, the complainant executed to the said John Taylor, as the agent and for the benefit of the said firm of Greenway and Potter, his bond, and also a mortgage of and upon certain lots of land containing together one thousand nine hundred and ninety-seven acres, situated on the westerly side of the Susquehannah river, and described in the said mortgage as part of a tract of eight thousand acres of land located by Peter W. Yates and others therein named, and which these defendants believe to be the same lands referred to in the said bill as comprehended in the said last mentioned mortgage; and these defendants have also understood and believe that default having been made in the payment of the said debt, according to the condition of the said bond, a bill of complaint was exhibited in this court, by and in the name of the said John Taylor, against the complainant, and the said Robert Lenox and Hay Stevenson, for a sale of the said mortgaged premises, for the payment and satisfaction of the said debt, and that such proceedings were thereupon had, that under and in pursuance of a decretal order of this court, the said premises were

sold at public auction, by or under the directions of James M. Hughes, then one of the masters of the said court, and were by him in conjunction with the said John Taylor, and the said Robert Lenox and Hay Stevenson, granted and conveyed to William Wilson, he being the highest bidder for and the purchaser of the said premises, at such sale, for the price of one thousand and forty dollars and ten cents, and that the said William Wilson subsequently conveyed the same premises to the said John Taylor, and that the said John Taylor afterwards sold and conveyed the same for the benefit of the said Greenway and Potter, and accounted for the proceeds thereof to them. But these defendants are otherwise ignorant of this transaction, and speaking from their best knowledge and belief, they deny that the said John Taylor appropriated the said tract of land or the proceeds thereof to his own use and benefit, as is untruly charged in the said bill.

These defendants, further answering, say, that as to any abstract or memorandum of or concerning any deeds or lands which may have been delivered by the complainant to the said trustees or any of them, and as to the amounts and particulars of the debts which were due from the complainant to the United States, on the twentieth day of January, in the year one thousand seven hundred and ninety-eight, or at any other time, and as to the delivery of the certificates of any shares in the stock of the Northern or Western Inland Lock Navigation companies, and also as to the thirty-five land warrants mentioned in the said bill, and as to the book debts which may have been due to the complainant on the said twentieth day of January, in the said year one thousand seven hundred and ninety-eight, and as to the conveyance mentioned in the said bill to have been made to James Scott and Peter McDougal by the firm of Peter Fearchild and Company, for the benefit of their creditors, these defendants are wholly uninformed and ignorant, otherwise than from the allegations of the said bill, which allegations as to these particulars these defendants are wholly unable to answer.

These defendants, further answering, say, that they have been informed and believe that the said Hay Stevenson departed this life sometime in or about the fall of the year one thousand seven hundred and ninety-nine; that certain moneys arising from the said trust estate came to the hands of the said John Taylor, and were in part applied by him to the payment of certain debts due by the complainant, but that no division or distribution of the said trust estate was otherwise made by the said Hay Stevenson, Robert Lenox, and John Taylor, or any of them, during the lifetime of the said Hay Stevenson, or after his death, by the said John Taylor and Robert Lenox, or either of them, among the complainant's creditors, or any of them. And these defendants have also been informed, and so believe, that certain of the complainant's creditors being desirous to place the affairs of the said trust estate under the management of other trustees, and the said Robert Lenox and John Taylor being desirous to resign their trust, it was proposed and agreed that new trustees should be

appointed in their place, and that at a general meeting of the complainant's creditors, held on some day previous to the twenty-sixth day of June, in the year one thousand eight hundred and eleven, (but on what days these defendants are ignorant,) James McEvers, one of the com mercial firm of Le Roy, Bayard and McEvers, of the city of New York, David A Ogden, then of the same place counsellor at law, and John Day, one of the commercial firm of Ferguson and Day, then of the said city, merchants, were nominated by the said creditors, as such new trustees, in the place and stead of the said Robert Lenox and John Taylor. That the evidence of the proceedings of the said meeting having been lost or mislaid, a written paper or instrument, intended to show the assent of the creditors to such assignment of the said trust estate, by the said Robert Lenox and John Taylor to the said James McEvers, David A. Ogden and John Day, dated the twenty-sixth day of June, in the year one thousand eight hundred and eleven, and purporting to testify such assent, was afterwards prepared and was duly subscribed by the said creditors or the greater part of them, and the complainant also expressed his assent to the said assignment, by writing under his hand at the foot of the said written paper or instrument, which paper was thereupon delivered to the said Robert Lenox and the said John Taylor, or to one of them for the benefit of both of them, as in and by the said written paper or instrument, and written assent of the complainant, in the possession of these defendants, ready to be produced to this court, and to which for greater certainty when produced, these defendants crave leave to refer, may appear.

And these defendants further say, that in pursuance of the said nomination and assent, an indenture bearing date the eighth day of February, in the year of our Lord one thousand eight hundred and twelve, purporting to be made between the complainant of the first part, and the said Robert Lenox and John Taylor of the second part, and the said James McEvers, David A. Ogden, and John Day, of the third part, was drawn and prepared for execution, by and between the said parties; by which indenture, after therein reciting the said first mentioned deed of assignment, and the trusts thereby declared, and that after the making of the same, the debts due to the United States, and to the said Hay Stevenson, had been paid and satisfied, and that several of the creditors of the complainant had come in under the said assignment, and granted the complainant a general release and discharge, and after also therein reciting the death of the said Hay Stevenson, and that the said John Taylor and Robert Lenox were desirous to resign the trust committed to them as aforesaid, and had signified their wish that other assignees should be appointed in their place; and that at a meeting of the creditors of the said complainant, convened for that purpose, the said James McEvers, David A. Ogden, and John Day, were nominated and appointed such assignees in the place and stead of the said John Taylor and Robert Lenox, it was witnessed that the said John Taylor and Robert Lenox, for the consideration aforesaid, and also in consideration of one dollar

to them in hand paid by the said James McEvers, David A. Ogden, and John Day, the receipt whereof was thereby acknowledged, and by and with the consent and approbation of the complainant, thereby testified, did grant, bargain, sell, release, convey, and assign to the said James McEvers, David A. Ogden, and John Day, all and singular the real and personal estates, both in law and equity, in possession, reversion or remainder, which was of the complainant at the date of, and which passed by the said therein recited indenture, excepting only certain household furniture, and other effects therein mentioned to have been given and granted to the complainant in and by the said general release and discharge, and all his books, vouchers and securities relating to the same, and also all the estate, right, title and interest of them, the said John Taylor and Robert Lenox, and of him, the said complainant, of, in, and to, the same, and of, in, and to, every part thereof, excepting as is above mentioned. To be had and holden unto the said James McEvers, David A. Ogden, and John Day, their heirs, executors, administrators and assigns forever, as joint tenants and not as tenants in common, upon trust to grant, bargain, sell and dispose of the same, and the monies arising from such sales, and other the monies which should be collected and received in virtue of the said deed of assignment, to pay, apply, and dispose of in manner following: that is to say, in the first place, to pay and discharge all claims against the said James McEvers, David A. Ogden, and John Day, by reason or means of the said trust, together with a reasonable and just compensation for their services; and secondly, to pay and distribute the residue of the said monies equally and rateably among such of the creditors of the complainant at the date of the said first recited assignment, as had or should, under the terms thereof, become entitled thereto; and in and by the said indenture it was further witnessed that full power and authority was thereby granted to the said James McEvers, David A. Ogden, and John Day, or any two of them, and the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, by all lawful ways and means to collect and receive all and singular the debts and sums of money which were due, payable, or belonging to the said John Taylor and Robert Lenox, as such his assignees, and the same to compromise and agree, and for the same to give and grant good and sufficient discharges, and also to sell and dispose of all and singular the lands and other real estate of the complainant so assigned as aforesaid, at public or private sale, and upon such credit or terms of payment as to them, the said James McEvers, David A. Ogden, and John Day, should appear best, and to constitute and appoint subordinate attornies, with the like or more limited powers; and that after paying and discharging all the debts due from the complainant, and all expenses and charges attending the execution of the said trust, that they, the said James McEvers, David A. Ogden, and John Day, and the survivors and survivor of them, should pay to the complainant, his executors, administrators, or assigns, what should appear on a fair account stated to be remaining in his or their hands

over and above the said debts, charges and expenses, and that they should also reconvey and re-assign to the complainant, his heirs, executors, administrators, or assigns, all such property or debts thereby assigned, as should be then not conveyed, unreceived, or unaltered, if any such there should be, as in and by the said last mentioned indenture under the hands and seals of the said John Taylor and Robert Lenox, remaining in the possession or under the control of the said John Day, and to which, for greater certainty, these defendants crave leave to refer, may more at large appear.

These defendants, further answering, say, that the said last mentioned indenture was duly executed by the said John Taylor and Robert Lenox, and by certificates endorsed thereon it appears that its execution by each was duly proved before Benjamin Ledyard, then one of the masters of this court, on the twenty-first day of April, in the year of our Lord one thousand eight hundred and twelve; and that on the thirtieth day of the same month it was recorded in the secretary's office of the State of New York, in book of deeds MRR, page two hundred and three, and on the thirty-first day of May, in the year one thousand eight hundred and thirteen, in the clerk's office of the county of Chenango, in liber O of deeds, page two hundred and thirteen, to which certificates, and as to the records of the said several offices, these defendants, for greater certainty in the premises, crave leave to refer.

And these defendants, further answering, say, that although upon the face of the said last mentioned indenture, the complainant is named as a party thereto, yet it appears not to have been executed by him. That these defendants are unable to account for the complainant's omission to execute the said indenture, but being so informed and so fully believing, they aver that he was privy to the resignation of the old, and to the nomination of the said new trustees, and to the execution by the said Robert Lenox and John Taylor, of the said last mentioned indenture, and fully assented thereto, and has always approved of and acquiesced in such change of trustees and in such assignment of the said trust estates to the said James McEvers, David A. Ogden, and John Day.

These defendants, further answering, say, that upon the execution of the said last mentioned indenture of assignment by the said Robert Lenox and John Taylor, the books of account, notes, obligations, vouchers, securities, title deeds and documents, appertaining or belonging to the said trust estates, were, as these defendants have understood and believe, handed over to the said James McEvers, David A. Ogden and John Day, or some or one of them, who, or the survivors or survivor of whom have ever since been in the possession of the same, and charged with the care, management and disposition of the said trust estates, and have acted as trustees thereof, and in the execution of the trust created by the said indenture, have proceeded in the collection of the debts thereby assigned, and in the sale and disposition of the real estate thereby conveyed; and also in the distri-

bution among the complainant's creditors of the monies arising from the said estates, and that the said trusts are still in a course of execution by the said John Day, now the sole surviving trustee of the said estate, the said James McEvers and David A. Ogden having both departed this life; and speaking according to their best knowledge, information and belief, these defendants do further aver that since the assignment of the said trust estates by the said John Taylor and Robert Lenox, as above set forth, the said John Taylor and Robert Lenox have not, nor hath either of them, at any time or in any manner, interfered with the management of, or assumed any care or charge of the said trust estates.

And these defendants, further answering according to their best knowledge, information and belief, do further say, that whilst the said trust estates remained vested in the said Hay Stevenson, Robert Lenox, and John Taylor, and the survivors of them, there were no adequate funds at any time in the hands or under the power of them, or either of them, by which to redeem those parts of the trust estates which were under mortgage or otherwise encumbered, and that none of them were redeemed or relieved from such incumbrances, and that no surplus monies arising from the sales of any of the mortgaged premises mentioned in the said bill of complaint, ever came to the hands of the said John Taylor, or, as these defendants believe, to the hands of the said Robert Lenox and Hay Stevenson, or either of them. That none of the lands or real estate conveyed by the complainant to the said Robert Lenox, Hay Stevenson, and John Taylor, by the said first mentioned deed of assignment, were sold or otherwise disposed of by them, and that none of the debts thereby assigned were recovered or collected by them, excepting those specified in an account marked C, annexed to the answer of the said John Taylor to a bill of complaint heretofore exhibited in this court by the complainant against him, and the said Robert Lenox and certain creditors of the complainant, and hereinafter referred to, a copy of which account is also hereunto annexed, marked A, and which, as these defendants believe, contains a true statement of all the monies arising from the trust estate which came to the hands of the said John Taylor, and of the application of the same, so far as the same were applied by him; that the sums therein credited, are according to the best knowledge, information and belief of these defendants, the only monies arising from any of the said trust estates which have ever come to the hands of the said John Taylor, and that these defendants have no knowledge or information of any monies arising from the said trust estate which have come to the hands of the said Robert Lenox, nor do they believe that any such monies were received by him.

And these defendants, further answering, say, that they are ignorant whether any account of the said trust estates has been ever rendered to the said complainant by the said Robert Lenox, John Taylor, and Hay Stevenson, or any of them, or has ever been required by him, of them, or any of them, except that it appears by the said answer of the said John Taylor, and so these defendants believe to be the

truth, that some time in the year one thousand and eight hundred, he made out and rendered to the said David A. Ogden, as the attorney of the said first mentioned trustees, he being also the attorney and legal adviser of several of the complainant's creditors, a statement of his receipts and expenditures in relation to the said trust estates up to that time, and according to the best knowledge and information of these defendants, the said John Taylor was never called on by the complainant or any other person, to render any further or other account of or concerning the said estates until the date of the two letters of the complainant's solicitor of the twenty-fourth day of February, and of the sixth day of March, in the year one thousand eight hundred and thirty, mentioned in the said bill of complaint to have been addressed to the said John Taylor, and which letters, as these defendants have been informed and believe, and do therefore admit, were received by the said John Taylor.

These defendants, further answering, say, that they have been informed and believe that from the time of the assignment of the said trust estates to the said James McEvers, David A. Ogden, and John Day, herein before mentioned, down to the time of the filing of the said bill, they, the said James McEvers, David A. Ogden, and John Day, or the survivors or survivor of them, have had and exercised, and were known by the complainant to have had and exercised the exclusive charge, management, care and control of the said trust estates, and in the execution of their trusts have sold and disposed of various portions of the said estate, and collected divers sums of money thence arising, and have made various divisions of the said monies among the complainant's creditors; and these defendants have been informed and believe, and do admit, that the complainant, as assignee of the two creditors named in his said bill, has at the several times therein mentioned, received the several sums of money therein specified, on account of the debts due to such creditors, and that such sums were paid out of monies arising from the said trust estates. All which sums, as these defendants expressly aver, were so received by the complainant from the said David A. Ogden, John Day, and James McEvers, or the survivors or survivor of them, as the then assignees and trustees of the said estate, acting in the due and regular execution of their trusts under the assignment so made to them as aforesaid, and long after the trust originally assumed by the said Robert Lenox and John Taylor was, by means of such assignment, and by the complainant was known to be terminated.

These defendants, further answering, say, that the said James McEvers, and David A. Ogden, are now both dead, and the said trust estates, so far as they have been converted into money and divided among the said creditors, or otherwise applied to the purposes of the said trust, continue under the care, management and charge of the said John Day, as survivor of the said James McEvers, and David A. Ogden, and that he only ought to account, or can account for the same, except as to the acts and receipts of the said John Taylor herein before mentioned; and these defendants have no know-

ledge or information of, and are wholly unable to render any further or other account of or concerning the said trust estate than as is hereinbefore contained, but these defendants have always understood and believe that the said trust estates have been found to be and are wholly insufficient for the payment of the debts due to the complainant's creditors, for the satisfaction of which the said estates were assigned as aforesaid.

And these defendants, further answering, according to their best knowledge, information and belief, do deny that the said Robert Lenox and John Taylor, or either of them, have or has, been guilty of any gross neglect in the management of the said trust estates, or have or has converted any part of the said estates to their or either of their own use, or that the said John Taylor, at the time of his death was, or that these defendants, as executors of the last will and testament of the said John Taylor, deceased, now are indebted to the complainant in any manner, or on any account whatever.

And these defendants do humbly submit that the assignment and conveyance of the said trust estates, herein before mentioned to have been made by the said Robert Lenox and John Taylor to the said James McEvers, David A. Ogden, and John Day, was and is valid and effectual, and that the said Robert Lenox and John Taylor were thereby released and discharged from the further execution of the trust created by the said first mentioned deed of assignment, and ought not to be called in question as to any account or disposition of the said trust estates, subsequent to such assignment thereof to the said David A. Ogden, James McEvers, and John Day, and that under the circumstances of the case, the complainant is not entitled as against these defendants, and the said Robert Lenox, to the relief and discovery sought by his said bill of complaint.

And these defendants, further answering, say, that heretofore, to wit, on the fifteenth day of April, in the year one thousand eight hundred and thirty, the complainant exhibited his bill of complaint in this court, against the said Robert Lenox and John Taylor, and afterwards amended the same by adding, as parties defendants, the said Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Philips and Brothers, Rhoades and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, which bill was for the same matter, and to the same effect, and for the like relief and purpose as the complainant doth in and by his said present bill set forth. And the said Robert Lenox and John Taylor, having been severally served with process of subpœna for that purpose, severally appeared and put in their several answers to the said amended bill, therein, among other things setting forth the said deed of assignment and conveyance of the said trust estates, to the said David A. Ogden, John Day, and James McEvers, and the acceptance by them of the trusts therein mentioned; and as to the others of the defendants named in the said bill, the same was taken as confessed. That the complainant replied to the answers of

the said Robert Lenox and John Taylor, and as to them, the said suit being at issue, witnesses were examined therein, and upon a hearing of the said cause on the merits thereof, in this court, before the vice-chancellor of the first circuit, it was, by a decretal order of the said court, made on the fourteenth day of January, in the year one thousand eight hundred and thirty-three, adjudged and decreed, that the said bill of complaint should be dismissed with costs, the vice chancellor being of opinion that the said John Taylor and Robert Lenox were liable only in respect to the proceeds of the said trust estate, which came to their hands prior to the said deed of assignment, so made by them to the said James McEvers, David A. Ogden, and John Day, and that the account thereof could only be taken in connection with the account of them, the said second trustees, or the survivor of them; in order to which it was directed by the said decretal order, that the said dismissal should be without prejudice to the complainant's right to make the said Robert Lenox and John Taylor parties to a new bill against the said second trustees, from which decree the complainant appealed to the chancellor of the State of New York, after which the said John Taylor departed this life, and the said suit and proceedings were revived against these defendants as executors of his last will and testament, and afterwards the said appeal was heard in this court before the chancellor; and thereupon, by a decree of the said court, made before the chancellor at the city of Albany, on the third day of March, in the year one thousand eight hundred and thirty-five, it was ordered, adjudged, and decreed, that the said decree so appealed from should be, and the same thereby was, affirmed; and afterwards the complainant appealed and presented his petition of appeal, thereby appealing from the said last-mentioned decree to the honorable the president of the senate, the senators, and the judges of the supreme court of judicature, of the people of the State of New York, in the court for the correction of errors; and these defendants, and the said Robert Lenox, put in their answers to the said petition, and the said appeal was afterwards heard in the said court for the correction of errors; and thereupon, by an order and decree of the said last-mentioned court, made at the city of Albany, on the thirtieth day of December, in the year one thousand eight hundred and thirty-five, it was ordered, adjudged, and decreed, that the said decree of this court, so made by the chancellor, and so appealed from, should be in all things affirmed, and that the said cause and proceedings should be remitted to the court of chancery, and the same were so remitted; and by an order of the said court of chancery, made at Albany, on the fifth day of February, in the year one thousand eight hundred and thirty-six, it was ordered that the said remittitur should be received and filed in that court, and the said decree of the said court for the correction of errors was thereby made and declared to be an order or decree of this court, as in and by the several pleadings and proceedings aforesaid, remaining as of record in this honorable court, may appear; and these defendants aver that the said several decrees remain in full force and effect, and that the account and relief prayed

by the complainant's present bill, and the claims and demands thereby controverted and sought to be established against these defendants and the said Robert Lenox, and the account and relief prayed by the complainant's said former bill, and the claims and demands thereby controverted and sought to be established against these defendants, and against the said Robert Lenox, are the same, and not other or different; wherefore these defendants claim and insist on the benefit of the said former suit and proceedings, and of the said several decrees therein, in like manner, and with the like effect, as if the same were by them pleaded in bar of the present bill of the complainant; and these defendants deny all and all manner of combination and confederacy charged in the said bill of complaint, without that any other matter or thing therein contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true to the knowledge or belief of these defendants; all which matters and things these defendants are ready to aver, maintain and prove, as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) JOHN JOHNSTON,
JAMES S. TAYLOR.

(Signed) R. H. OGDEN, *Sol'r for Def'ts.*
T. L. OGDEN, *Of Counsel for Def'ts*

CITY AND COUNTY OF NEW YORK, *ss.*

The above-named defendants, John Johnston and James S. Taylor, were on this ninth day of March, A. D. 1836, severally sworn before me, that they had heard the foregoing answer read, and knew the contents thereof; that the same is true of their own knowledge, except as to the matters therein stated, to be on their information and belief, and that as to those matters they believe it to be true.

(Signed) D. HOBART,
Commissioner of Deeds.

SCHEDULE A.

DR. *Estate of Andrew Mitchell in account with John Taylor, acting Trustee.* CR.

1798.						1798.						
August	13	To Cash paid James Taylor's execution against the estate of Andrew Mitchell,	£279	7	1	Dec.	17	By Cash for sale of lease of stable,	£100		
1799.						Dec.	19	By do. for rent from E. Lyde,	4		
April	20	To Cash paid for cost of Creighton's writ against A. Mitchell,	5	10	0	1799.					
1800						Jan.	23	By do. for rent from Collins,	14		
July	18	To Cash paid charges of suit against Noyes,	14	10	4	April	26	By do. for rent from Schermerhorn & Son,	4	8	
1804.						May	2	By do. for rent from Van Tuyle & Son for 1 year's rent of stable,	20		
June	27	To Cash paid Hay Stevenson,	200	14	9	Aug.	20	By do. for rent from Rhodes & Lyde, for 1 year's rent of stables,	9		
						Sept.	5	By J. Little, for bill of exchange,	84	15	1
						Oct.	31	By interest on Little's balance,	13	14	10
						1800.					
						Feb.	8	By Cash from Noyes on suit	74		
						April	21	By do. from Noyes in full,	15	9	
						Nov.	2	By draft on Norfolk on Saunder's debt,	322	8	
						1802.					
		Balance,	213	7	6	April	5	By Cash from estate of John Duncan,	89	5	
			£750	19	11				£750	19	11

IN CHANCERY.

Before the Chancellor.

The replication of Andrew Mitchell to the separate answer of Robert Lenox, impleaded with John Johnston and James S. Taylor, executors of the last will and testament of John Taylor, deceased, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse.

This repliant, saving and reserving to himself now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says, that he will aver, maintain, and prove his bill of complaint to be true, certain, sufficient in the law, to be answered unto; and that the said answer of Robert Lenox, impleaded with John Johnston and James S. Taylor, executors of the last will and testament of John Taylor, deceased, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, is uncertain, untrue, and insufficient, to be replied to by this repliant, without that, that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things, this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

J. S. MITCHELL,
Solicitor and Counsel for Complainant.

IN CHANCERY.

Before the Chancellor.

The replication of Andrew Mitchell to the separate answer of John Johnston and James S. Taylor, executors of the last will and testament of John Taylor, deceased, impleaded with Robert Lenox, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath, and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse.

This repliant, saving and reserving to himself now, and at all times hereafter, all, and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, says, that he will aver, maintain, and prove his bill of complaint to be true, certain, sufficient in the law, to be answered unto; and that the said answer of John Johnston and James S. Taylor, executors of the last will and testament of John Taylor, deceased, impleaded with Robert Lenox, John Day, Simon Walker, James Greenway, Thomas Coleman, John Coleman, Robert Coleman, and the persons composing the several firms of Niven, Galbreath, and Company, J. L. Phillips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse, is uncertain, untrue, and insufficient, to be replied to by this repliant, without that, that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law, to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

J. S. MITCHELL,
Solicitor and of Counsel for Complainant.

The people of the State of New York, by the grace of God free and independent:—To Edward Montague, of Beccles, in the county of Suffolk, in England, gentleman, Benjamin Crickmore, of the same place, merchant, and William Crawfoot, of the same place, physician, greeting:

Whereas, Andrew Mitchell, formerly of the city of New York, now deceased, did exhibit his original bill of complaint before us in our court of chancery against John Day, together with Robert Lenox and others therein named, and since the death of the said Andrew Mitchell, one John S. Mitchell, as executor of his last will and testament, hath exhibited a bill of revivor and supplement in our said court against the same and certain other defendants therein named. And whereas we have, by our writ, commanded the said John Day to appear before us in our said court of chancery, at a certain day, to answer the said original bill of complaint, and also the said bill of revivor and supplement:

Know ye, therefore, that we have given unto you, or any two or one of you, full power and authority, at such a day and place as you shall think fit, to go to the said John Day, if he cannot conveniently come unto you, and take his answer to the said original bill, and also to the said bill of revivor and supplement, upon his corporal oath to be administered by you, or any two or one of you, to the said answer, the same being read and distinctly written on paper; and when you shall have so taken it, you are to send the same closed up under your

seals, or the seals of any two or one of you, unto us in our said court of chancery, wheresoever it shall then be, together with this writ.

Witness, Reuben Hyde Walworth, Chancellor of the State of New York, this twenty-second day of November, in the year of our Lord one thousand eight hundred and thirty-six.

JOHN WALWORTH,
Assis't Register.

The execution of the within appears by the annexed schedule. Edward Proudfoot Montague, Beccles, Esq., Justice of Peace for the county of Suffolk, within called Edward Montague, gentleman, William John Crawfoot, Beccles, Suffolk, physician, within called William Crawfoot, physician.

The undersigned hereby certify that Benjamin Crickmore, one of the commissioners within named, is dead.

EDWARD PROUDFOOT MONTAGUE.
WILLIAM JOHN CRAWFOOT.

STATE OF NEW YORK, *In Chancery.*

The separate answer of John Day, one of the defendants to the original bill of complaint exhibited by Andrew Mitchell, since deceased, complainant, against this defendant, together with Robert Lenox, John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, Simon Walker, James Greenway, Thomas Coleman, John Coleman, and the persons composing the several firms of Niven, Galbreath and Company, J. L. Philips and Brothers, Rhodes and Briggs, Knuckel and Ruys, Brown, Sharps and Company, Joseph Lyon and Company, Bowerbank, Monkhouse and Company, and Clegg and Perkhouse. And also to the bill of revivor and supplement exhibited by John S. Mitchell, complainant, against the same defendants, together with Susan Mitchell, Ann Mitchell, Cornelia Mitchell, Eliza Mitchell, and George Mitchell.

This defendant, saving and reserving to himself all benefit of exception to the said original bill of complaint, for answer thereunto, or unto so much of such parts thereof as he is advised that it is material or necessary for him to make answer unto, he doth answer and say: that he believes and admits that some time in or about the month of January, in the year one thousand seven hundred and ninety-eight, the said Andrew Mitchell, the complainant named in the said original bill, executed under his hand and seal a deed of assignment of that date, thereby granting, conveying, and assigning unto the above named defendant, Robert Lenox, and to Hay Stevenson and John Taylor, since deceased, and to the survivors and survivor of them, all his real and personal estates, both in law and equity, in possession, reversion, and remainder, and all his books, vouchers, and securities relating to the same, upon the trusts and for the purposes therein specified.

That Margaret, the wife of the said Andrew Mitchell, did, by such deed as is also mentioned in the said original bill, release to the said John Taylor, Hay Stevenson, and Robert Lenox, and to the survivors of them, and to the heirs and executors of such survivor, all her right and interest to and in the estates mentioned and described in the said first mentioned deed of assignment, upon the trusts and for the purposes therein expressed. And this defendant believes that the substantial contents of each of the said deeds are truly stated in the said original bill, so far as the same are therein set forth, and that the two paper writings annexed to the said original bill, and therein stated to be copies of the said deeds, are true copies thereof; and for greater certainty in the premises, this defendant craves leave to refer to the originals of the said several deeds when produced to this honorable court, both which originals were left by this defendant, and now remain under and subject to the control of this defendant, in the hands of his agents and attornies in the city of New York, ready to be produced to this honorable court, neither of the said deeds being in the possession or under the control of the said Robert Lenox, as is erroneously stated in the said original bill.

And this defendant doth believe and admit that each of the said deeds were recorded as is charged in the said original bill of complaint, and that the said Andrew Mitchell, at the date of the said first mentioned deed, was indebted to various persons in divers sums of money which he was then unable to pay; but what was the amount of the said debts, to whom they were due, and what suits, if any, had been commenced against him for the recovery of the said debts, this defendant is ignorant and unable to answer.

And this defendant doth also believe and admit that the said Andrew Mitchell, at the date of the said deed, was seized and possessed of a considerable estate, real and personal; of the value of which estates this defendant is ignorant otherwise than as is hereinafter stated, but according to his best knowledge and belief, such estates were wholly inadequate to the payment of the debts of the said Andrew Mitchell, and could not by any possible means have been made sufficient to pay the same.

And this defendant further answering, says, that he has been informed and believes that the said Andrew Mitchell delivered to the said John Taylor various deeds of conveyance, notes, and obligations, of and concerning the said trust estates, and that in pursuance of the directions or authority of the said trustees he delivered his books of account to David A. Ogden, their then legal adviser, and who was by them instructed to proceed in the collection of the debts due to the said estate; but what particular deeds of conveyance, notes, obligations, books of account, or other documents and vouchers may have been delivered by the said Andrew Mitchell to the said trustees, or any or either of them, or to the said David A. Ogden, and what receipts or acknowledgments, if any, were given by the said John Taylor for or in respect to the said deeds, notes, obligations, books of account, or other documents and vouchers, this defendant is ignorant and unable to answer.

This defendant further answering, saith, that he believes and admits that the said Hay Stevenson and John Taylor, two of the trustees named in the said first mentioned deed of assignment, have departed this life, as charged in the said original bill, and that John Johnston and James S. Taylor are executors of the last will and testament of John Taylor, deceased; and this defendant has understood and believes, that several of the creditors of the said Andrew Mitchell did execute to him a discharge and release in writing, in compliance with the terms of the first above mentioned deed of assignment, but at what time and by whom in particular such discharge and release was executed, and in what amounts the said Andrew Mitchell was indebted to them, respectively, what settlement or settlements may have been made between the said Andrew Mitchell and any of his said creditors, and what assignments or transfers may have been made by them, or any of them, this defendant is ignorant and unable to answer, otherwise than is hereinafter stated. And this defendant is also ignorant of and unable to answer the several allegations contained in the said original bill, concerning the bonds and mortgages therein stated to have been executed and delivered by the said Andrew Mitchell to the said Hay Stevenson, to secure the debt therein mentioned to be due to Edward Cairns, William Frears, and John Kirmichael, and also concerning the several mortgages therein mentioned to have been given to, or held by, Robert C. Johnson, and Galbreath and Elmes, respectively; and also concerning the bond and mortgage therein mentioned to have been executed and delivered by the said Andrew Mitchell to the said John Taylor, to secure the debt therein mentioned to be due to the firm of Greenway and Potter; and as to what lands were included in the said mortgages respectively; whether such lands, or any of them, were redeemed; whether any interest has been paid on the sums for which they were mortgaged; and whether any and which of the said mortgaged lands have been sold under foreclosures thereof, or otherwise; and, if sold, at what time or times, and at what price or prices, and to whom or for whose benefit, and how the proceeds thereof were applied or disposed of, this defendant is also ignorant, and unable to answer.

And this defendant further answering, saith, that he has no knowledge or information concerning the memorandum set forth in the said original bill of complaint, respecting the deeds therein mentioned to have been delivered by the said Andrew Mitchell to the said Robert Lenox and John Taylor and Hay Stevenson, nor concerning the existence or payment of the debts therein mentioned to have been due from the said Andrew Mitchell to the United States, and to the said Hay Stevenson, otherwise than as such payments are recited in the trust conveyance hereinafter set forth, nor concerning the delivery by the said Andrew Mitchell to the said Robert Lenox, Hay Stevenson, and John Taylor, of the certificates of shares in the stock of the Western and Northern Lock Navigation Company, nor concerning the interest of the said Andrew Mitchell in the land warrants, and in a lease of the stables mentioned and referred to in the said

original bill of complaint; and further or otherwise than as is hereinafter stated, is unable to answer the allegations therein contained in respect to these matters, or any of them.

And this defendant is also ignorant as to the amount of debts due to the said Andrew Mitchell at the date of the said first mentioned assignment, and whether the said Andrew Mitchell was or was not at that time, or any other time, a creditor of the firm of Peter Fearchild and Company, whether the said firm conveyed any real estate to James Scott and Peter M'Dougall, and whether any and what interest in the said estate was assigned by the said Andrew Mitchell to the said John Taylor, Robert Lenox, and Hay Stevenson, this defendant is also ignorant and unable to answer.

This defendant further answering, saith, that the said Hay Stevenson departed this life, according to this defendant's best information and belief, soon after the date of the first mentioned assignment, and that no division or distribution of the moneys arising from said trust estates among the creditors of the said Andrew Mitchell was made by the said Robert Lenox, John Taylor and Hay Stevenson, during the lifetime of the said Hay Stevenson, or after his death by the said Robert Lenox and John Taylor; and that in or about the year one thousand eight hundred and eleven, the said Robert Lenox and John Taylor being desirous to be released from the further execution of the trusts created by the said first mentioned deed of assignment, a meeting of the creditors of the said Andrew Mitchell was in consequence thereof convened in the city of New York, and that at such meeting it was proposed and agreed that James McEvers, then of the city of New York, one of the partners in the then commercial firm of Le Roy, Bayard, and McEvers, David A. Ogden, then of the said city of New York, counsellor at law, and this defendant, then of the same place, and a partner in the commercial firm of Ferguson and Day, should be the assignees and trustees of the estate of the said Andrew Mitchell, in the place and stead of the said Robert Lenox and John Taylor, and should accept and take from them an assignment of all the residue and remainder of the said estate, upon the trusts and for the purposes expressed in the said original deed of assignment; and thereupon a written paper or instrument intended to show the assent of the creditors to such assignment by the said Robert Lenox and John Taylor to the said James McEvers, David A. Ogden, and this defendant, dated the twentieth day of June, in the year one thousand eight hundred and eleven, and purporting to testify such assent, was afterwards prepared and subscribed by several of the said creditors, and the said Andrew Mitchell, by writing under his hand at the foot of the said written paper or instrument, also expressed his assent to the said assignment, which paper was thereupon delivered, as this defendant has been informed and believes, to the said Robert Lenox and John Taylor, or to one of them for the benefit of both, and is now in the possession of the executors of the said John Taylor, and to which for greater certainty this defendant craves leave to refer.

And this defendant further answering, says, that in pursuance of the said nomination and assent, an indenture bearing date the eighth day of February, in the year of our Lord one thousand eight hundred and twelve, purporting to be made between the said Andrew Mitchell of the first part, the said John Taylor and Robert Lenox of the second part, and the said James McEvers, David A. Ogden, and this defendant, of the third part, was prepared by counsel, by which indenture, after therein reciting the said first mentioned deed of assignment and the trusts thereby declared, and that after the making of the same, the debts due to the United States and to the said Hay Stevenson had been paid and satisfied, and that the several creditors of the said Andrew Mitchell had come in under the said assignment and granted a general release and discharge, and after also therein reciting the death of the said Hay Stevenson, and that the said Robert Lenox and John Taylor were desirous to resign the trust committed to them as aforesaid, and had signified their wish that other assignees should be appointed in their place, and that at a meeting of the creditors of the said Andrew Mitchell, convened for that purpose, the said James McEvers, David A. Ogden and this defendant had been nominated and appointed in the place and stead of the said Robert Lenox and John Taylor, it was witnessed that the said Robert Lenox and John Taylor, for the consideration aforesaid, and also in consideration of one dollar to them in hand paid by the said James McEvers, and David A. Ogden, and this defendant, the receipt whereof was thereby acknowledged, and by and with the consent and approbation of the said Andrew Mitchell, thereby testified, did grant, bargain, sell, release, convey, and assign, to the said James McEvers, David A. Ogden, and this defendant, all and singular the estate, real and personal, both in law and equity, in possession, reversion or remainder, which was of the said Andrew Mitchell at the date of and which passed by the said therein recited indenture, excepting only certain household furniture, and other effects therein mentioned to have been given and granted to him, in and by the said general release and discharge, and all his books, vouchers and securities relating to the same, and also all the estate, right, title and interest of them, the said John Taylor and Robert Lenox, and him, the said Andrew Mitchell, of, in, and to the same, and of, in, and to every part thereof, excepting as is above mentioned. To be had and holden unto the said James McEvers, David A. Ogden, and this defendant, their heirs, executors, administrators, and assigns, forever, as joint tenants, and not as tenants in common, upon trust, to grant, bargain, sell, and dispose of the same in the manner therein and thereinafter expressed and contained, and the moneys arising from such sales, and other the moneys which should be collected and received in virtue of the said deed of assignment, to pay, apply and dispose of, in manner following, that is to say: in the first place to pay and discharge all claims and demands against the said James McEvers, David A. Ogden and this defendant, by reason or means of the said trust, together with a reasonable and just compensation

for their services; and secondly, to pay and distribute the residue of the said moneys equally and rateably among such of the creditors of the said Andrew Mitchell at the date of the said first recited assignment, as had or should, under the terms thereof, become entitled thereto; and in and by the said indenture it was further witnessed, that full power and authority was thereby granted to the said James McEvers, David A. Ogden, and this defendant, or any two of them, and the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, by all lawful ways and means to collect and receive all and singular the debts and sums of money which were due, payable or belonging to the said Robert Lenox and John Taylor, as such his assignees, and the same to compound, compromise and agree, and for the same to give and grant good and sufficient discharges, and also to sell and dispose of all and singular the lands and other real estate of the said Andrew Mitchell, so assigned as aforesaid, at public or private sale, and upon such credit or terms of payment as to them, the said James McEvers, David A. Ogden, and this defendant, should appear best, and to constitute and appoint subordinate attorneys, with the like or more limited powers, and that after paying and discharging all the debts due from the said Andrew Mitchell, and all the expenses and charges attending the execution of the said trust, that they, the said James McEvers, David A. Ogden, and this defendant, and the survivors and survivor of them, should pay to the said Andrew Mitchell, his executors, administrators, or assigns, what should appear in a fair account stated, to be remaining in his or their hands, over and above the said debts, charges, and expenses, and that they should also reconvey and re-assign to the said Andrew Mitchell, his heirs, executors, administrators, or assigns, all such property or debts thereby assigned as should be then not conveyed, unreceived, or unaltered, if any such there should be, as in and by the said last mention indenture, remaining under the control of this defendant in the hands of his said agents and attorneys, ready to be produced to this honorable court, and to which for greater certainty in the premises he craves leave to refer, may appear.

This defendant further answering saith, that the said last mentioned indenture was duly executed by the said John Taylor and Robert Lenox, and for some cause or reason not known to, or not now recollected by this defendant, was not executed by the said Andrew Mitchell, and that its execution by the said Robert Lenox and John Taylor was duly proved by Benjamin Ledyard, then one of the masters of this court, on the twenty-first day of April, in the year of our Lord one thousand eight hundred and twelve, and that on the thirtieth day of the same month it was recorded in the secretary's office of the State of New York, in book of deeds MRR, page 203, and on the thirty-first day of May, in the year one thousand eight hundred and thirteen, in the clerk's office of the county of Chenango, in Lib. Q of deeds, page 213, as by the records of the said several offices may appear.

This defendant further answering saith, that the said Andrew

Mitchell, according to this defendant's best knowledge, information, and belief, was privy to the resignation of the old, and nomination of the new trustees of the said estate as above mentioned, and also to the execution by the said Robert Lenox and John Taylor of the said last mentioned indenture, conveying the said trust estates to the said James McEvers, David A. Ogden, and this defendant; that soon after the date of the said last mentioned indenture, the charge and management of the said trust estates were in fact assumed by the said James McEvers, David A. Ogden, and this defendant. And this defendant doth expressly aver that from that time forward the said Andrew Mitchell had occasional interviews with this defendant in his character of trustee and assignee of the said estate, and communicated with him as such in respect to the management of the said trust estates, and never on any occasion objected to, or dissented from such change of trustees, but, on the contrary, always acquiesced therein, and recognised the said James McEvers, David A. Ogden, and this defendant, as the existing and rightful trustees and assignees of the said estate.

This defendant, further answering, saith, that upon or soon after the execution of the said last mentioned indenture of assignment by Robert Lenox and John Taylor, the books of account, and title deeds, and all the remaining notes and obligations, vouchers, securities and documents then appertaining or belonging to the said trust estates, were handed over to the said James McEvers, David A. Ogden, and this defendant, or some or one of them, and that they, or the survivors or survivor of them, have ever since been in the possession of the same, and exclusively charged with the care, management, and disposition of the said trust estates, and in the execution of the trusts created by the said indenture, have proceeded in the collection of the debts thereby assigned, and in the sale and disposition of the real estate thereby conveyed, and that the said trusts are still in the course of execution by this defendant, now the sole surviving trustee of the said estate, the said James McEvers and David A. Ogden having both departed this life.

This defendant, further answering, saith, that he is ignorant and unable to answer what moneys came to the hands of the said Robert Lenox, Hay Stevenson, and John Taylor, or either of them, arising from the said trust estate, and of the application of the said moneys, otherwise than as is recited in the said last mentioned indenture, and as is mentioned in the several answers of the said Robert Lenox and John Taylor, in the suit mentioned in the original bill to have been instituted in this court by the said Andrew Mitchell against them and others, and to have been decided by the decree of the vice chancellor of the first circuit dismissing the complainant's bill of complaint, and by the decrees of the chancellor and of the court for the correction of errors affirming such decree; and this defendant is also ignorant what application, if any, may have been made by the said Andrew Mitchell to the said Robert Lenox and John Taylor for an account of the said trust estates, and whether the said Robert Lenox

and the executors of the said John Taylor are indebted to the representatives of the said Andrew Mitchell, this defendant is ignorant and unable to answer.

And this defendant, further answering, saith, that the said James McEvers, David A. Ogden, and this defendant, and the survivors and survivor of them, in the execution of their trusts, have sold and disposed of various portions of the said trust estates, and collected divers sums of money thence arising, and have made two several divisions or dividends of the said moneys among the creditors of the said Andrew Mitchell, the first of which dividends was declared during the lifetime of the said James McEvers, and on or about the fifteenth day of November, in the year one thousand eight hundred and fifteen, and the second thereof after the death of the said James McEvers, and on or about twentieth day of May, in the year one thousand eight hundred and twenty-two, and were severally paid to the said creditors soon after those dates respectively. That this defendant was informed by the said Andrew Mitchell, and believes and admits it to be true, that prior to any distribution of the moneys arising from the said trust estates, the debts due from two of the creditors of the said Andrew Mitchell, to wit: from Anthony Blenon and from James Creighton, were assigned to, or to the use of the said Andrew Mitchell, but of the considerations, dates and particulars of such assignments, this defendant is ignorant. That the two dividends above mentioned were paid to the said Andrew Mitchell, as such assignee of the said Anthony Blenon and James Creighton, the first thereof by the said James McEvers, David A. Ogden, and this defendant, acting as trustees of the said estate, and the second thereof by the said David A. Ogden and this defendant, acting as surviving trustees thereof, and that receipts for the same were signed by the said Andrew Mitchell as the attorney of the said Anthony Blenon and James Creighton respectively; and that on the thirteenth day of February, in the year one thousand eight hundred and thirty, this defendant being then in the city of New York, and sole survivor of the said trustees, at the request of the said Andrew Mitchell, advanced to him as such assignee of the debts of the said Anthony Blenon and James Creighton, the sum of seventy dollars, in anticipation of a third dividend of the moneys arising from the said trust estates to be hereafter declared and made, for which last mentioned payment the said Andrew Mitchell, as representing the debts due to the said Anthony Blenon and James Creighton, also signed and delivered a receipt to this defendant as surviving trustee of the said estate, to which receipts remaining in the possession of this defendant's said agents and attorneys in the city of New York, this defendant, for greater certainty, craves leave to refer; and this defendant believes and admits that the said Andrew Mitchell has received no other sums of money on account of the said debts.

This defendant, further answering, says, that the said trust estates, so far as they have not been converted into money, and divided among the said creditors, or otherwise applied to the purposes of the said

trust, continue under the care and charge of this defendant as survivor of the said James McEvers and David A. Ogden, and that this defendant is ready and willing to account for the same whenever he shall be thereto required, and always has been ready and willing so to do.

And this defendant, further answering, saith, that he has understood and believes, and doth therefore admit that, at or about the time for that purpose, stated in the said original bill, the said Andrew Mitchell exhibited his bill of complaint in this honorable court against the said Robert Lenox and John Taylor, and the other defendants in the said bill named, and that such proceedings were had in the said suit, and such decrees made therein by the vice chancellor of the first circuit, the chancellor, and the court for the correction of errors, respectively, as in the said bill of complaint are set forth; and for greater certainty in the premises, this defendant craves leave to refer to the said several decrees, orders, and proceedings, when the same shall be produced to this honorable court.

And for answer to the said bill of revivor and supplement, or to so much and such parts thereof as this defendant is advised that it is material for him to answer, he doth answer and say, that he believes and admits, that such proceedings were had on the said original suit of the said Andrew Mitchell against this defendant, and the other defendants therein named, as are set forth in the said bill of revivor and supplement. And this defendant admits the death of the said Andrew Mitchell as is therein also stated; but whether the said Andrew Mitchell made and published such last will and testament, as is mentioned in the said bill of revivor and supplement, or any other last will and testament; and, if made and published, what interests, if any, in the said trust estates are claimed under the said will, this defendant is ignorant, and unable to answer.

And this defendant submits himself, in the premises, to the directions and decree of this honorable court, humbly praying that, as surviving trustee of the said estates, his rights may be preserved and protected.

And this defendant denies all combination and confederacy charged against him in the said original bill of complaint, without that, that any other matter or thing in the said original bill, and in the said bill of revivor and supplement contained, and not herein and hereby well and sufficiently answered unto, confessed, and avoided, traversed or denied, is true, to his knowledge or belief; all which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and prays to be hence dismissed, with his costs and charges in this behalf most wrongfully sustained.

(Signed) JOHN DAY.

R. H. OGDEN, *Sol'r for Def't.*

T. L. OGDEN, *of counsel for Def't.*

The defendant, John Day, on the fifth day of January, in the year of our Lord one thousand eight hundred and thirty-seven, before us

appeared, and declared that he had read the foregoing answer; and the said John Day thereupon signed the same in our presence, and was sworn before us, that he had read the said answer so subscribed by him, and that he knew the contents thereof, and that the said answer was true of his own knowledge, except as to those matters therein stated to be on his information and belief, and as to those matters, that he believed it to be true.

(Signed) EDWARD PROUDFOOT MONTAGUE,
WILLIAM JOHN CROWFOOT,
Commissioners.

Point for the Appellant.

The whole subject-matter of this suit has been adjudicated by the court for the correction of errors, on the 30th of December, 1835.—*See 14th vol. Wendel, page* 662.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the chancellor of the court of chancery of the State of New York—greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, between John S. Mitchell, executor of the last will and testament and devisee of Andrew Mitchell, deceased, appellant, and Robert Lenox, John Johnson, and James Taylor, executor of the last will and testament of John Taylor, deceased, and John Day, respondents, and other defendants—a manifest error hath happened to the great damage of the said John S. Mitchell, executor and devisee as aforesaid, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this second Monday of January, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-third.

FRED. J. BETTS,
Clerk of the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit.

STATE OF NEW YORK, *ss.*

The court for the trial of impeachments and the correction of errors of the said State, consisting of the President of the Senate, the Senators, Chancellor, and Justices of the Supreme Court, in obedience to the writ of error hereunto annexed, does hereby certify and return that before the coming of the said writ of error, all the proceedings in the cause therein mentioned, together with the decree of this court, made thereon, and all things concerning the same, were duly remitted by this court, in pursuance of the laws of the said State, to the court of chancery of the said State, to the end that the decree of this court might be carried into effect; in which said court of chancery, the proceedings and decree so remitted as aforesaid, and all things touching the same, now remain; and as the same are no longer before nor within the control of this court, this court is unable to make any further or other return to said writ of error. All which is respectfully submitted.

ALBANY, *December* 30th, 1839.

By order of the court,

L. BRADISH,
President of the Senate.
JOHN F. BACON,
Clerk of the Court.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judges of the court for the correction of errors for the State of New York—greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between John S. Mitchell, executor of the last will and testament, and devisee of Andrew Mitchell, deceased, appellant, and Robert Lenox, John Johnson, and James S. Taylor, executor of the last will and testament of John Taylor, deceased, and John Day, respondents, and others, defendants—a manifest error hath happened, to the great damage of the said John S. Mitchell, executor and devisee as aforesaid, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to be held at the city of Washington, District of Columbia, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this second Monday of January,

in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-third.

FRED. J. BETTS,

Clerk of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

By the Honorable Smith Thompson, one of the Judges of the Circuit Court of the United States, for the Southern District of New York, in the second circuit: To Robert Lenox, John Johnson, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, and John Day, respondents, and other defendants:

Whereas, John S. Mitchell, executor of the last will and testament, and devisee of Andrew Mitchell, deceased, lately issued out of the circuit court of the United States for the Southern District of New York, in the second circuit, a writ of error directed to the judges of the court for the correction of errors, of the State of New York, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judges thereof, between John S. Mitchell, executor of the last will and testament and devisee of Andrew Mitchell, deceased, appellant, and Robert Lenox, John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, and John Day, respondents, and other defendants, a manifest error hath happened, to the great damage of the said John S. Mitchell, executor and devisee of Andrew Mitchell, deceased.

And whereas, for the correction of that error in due manner, the said writ has been issued returnable at the next stated Supreme Court of the United States, to be held at the city of Washington, on the second Monday of January next; you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said second Monday of January next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the Southern District of New York, in the second circuit, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-third.

SMITH THOMPSON.

By the Honorable Smith Thompson, one of the Judges of the Circuit Court of the United States, for the Southern District of New York, in the second circuit: To Robert Lenox, John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, and John Day, respondents, and other defendants:

Whereas, John S. Mitchell, executor of the last will and testament and devisee of Andrew Mitchell, deceased, lately issued out of the circuit court of the United States for the Southern District of

New York, in the second circuit, a writ of error directed to the judges of the court for the correction of errors of the State of New York, stating, that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judges thereof, between John S. Mitchell, executor of the last will and testament and devisee of Andrew Mitchell, deceased, appellant, and Robert Lenox, John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, and John Day, respondents, and others, defendants, a manifest error hath happened, to the great damage of the said John S. Mitchell, executor and devisee of Andrew Mitchell, deceased.

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be held at the city of Washington on the second Monday of January next; you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said second Monday of January next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the Southern District of New York, in the second circuit, the second Monday of January, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States, the sixty-third.

SMITH THOMPSON.

SUPREME COURT OF THE UNITED STATES.

JOHN S. MITCHELL, executor, &c., of Andrew Mitchell, deceased, Plaintiff in Error,
vs.
ROBERT LENOX, and others, Defendants in Error.

And afterwards, to wit, on the second Monday of January, in the year one thousand eight hundred and thirty-nine, before the judges of the Supreme Court of the United States, at the city of Washington, comes the said John S. Mitchell, executor of the last will and testament and devisee of Andrew Mitchell, deceased, plaintiff in error, in his proper person, and says, that in the record aforesaid, and in the proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid given, was given for the said Robert Lenox, John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor deceased, and John Day, respondents, and other defendants, against the said John S. Mitchell, executor as aforesaid: Whereas by the law of the land, the said judgment ought to have been given for the said John S. Mitchell, executor as aforesaid, against the said Robert Lenox,

John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, and John Day: and the said John S. Mitchell, executor as aforesaid, prays that the judgment aforesaid, for the error aforesaid, and for other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

JOHN S. MITCHELL, *in pro. pers.*

The President of the United States of America, to the Marshal of the Southern District of the State of New York, greeting:

Whereas a suit on a writ of error is now pending in the Supreme Court of the United States, between John S. Mitchell, executor of the last will and testament and devisee of Andrew Mitchell, deceased, plaintiff in error, and Robert Lenox, John Johnston, and James S. Taylor, executors of the last will and testament of John Taylor, deceased, and John Day, defendants in error, and other defendants. And whereas the said Robert Lenox, one of the defendants in error has lately died in the city and State of New York, having first duly made and published his last will and testament in writing, and by the same constituted James Lenox his executor thereof, after whose death the said James Lenox duly proved the said last will and testament, and took upon himself the burden of the execution thereof, as by the information of the said John S. Mitchell, executor as aforesaid, I have been given to understand. I do therefore command you, that you make known to the said James Lenox, that he be before the judges of the Supreme Court of the United States, now in session in the city of Washington, to show if he hath, or knoweth of any thing to say for himself, why the said suit and the errors assigned therein ought not to be brought to a hearing before the said Supreme Court of the United States, at the present term of the said court.

Witness the Honorable Roger B. Teney, Esquire, Chief Justice of the Supreme Court of the United States, this second Monday of January, in the year of our Lord one thousand eight hundred and forty.

FRED. J. BETTS, *Clerk.*

I certify that I have made known to the within-named James Lenox, as required by the within writ, by showing to the said James Lenox, personally, the within writ, and at the same time delivering him a true copy thereof.

The answer of ANTHONY J. BLEECKER,
Marshal of the United States for the Southern District of New York.

Dated January 16th, 1840. –
Fees received, $2 75.

698.

SUPREME COURT OF THE UNITED STATES.

No. 63.

LEWIS CRUGER, PLAINTIFF IN ERROR,

vs.

WILLIAM H. TAYLOR.

IN ERROR TO THE CIRCUIT COURT OF U. STATES, EAST LOUISIANA.

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Langtree & O'Sullivan, Print.—1840.

CIRCUIT COURT OF THE UNITED STATES,
Ninth Circuit, Eastern District of Louisiana.

Be it remembered, that on the 11th day of April, in the year of our Lord one thousand eight hundred and thirty-eight, W. H. Taylor came into court, by his attornies, Elmore & King, Esquires, and filed the following petition, to wit:

To the Circuit Court of the United States, for the Ninth Circuit, sitting in the Eastern District of Louisiana:

This, the petition of William H. Taylor, citizen of the State of Alabama, respectfully represents, that Lewis Cruger, citizen of Louisiana and within the jurisdiction of this honorable court, is justly indebted to him in the sum of ($5,300) five thousand three hundred dollars, with interest on that sum, from 29th day of March, A. D. 1836, till paid, at the rate of 8 per centum per annum; which said rate of interest is allowed by the laws of Alabama, where the contract was entered into upon which this suit is founded.

For that petitioner is the owner and holder of a promissory note, executed by defendant in favor of petitioner; which said note is herewith attached for reference, by which he, defendant, promised, twelve months after date, to pay petitioner five thousand three hundred dollars, with interest from date till payment—said note dated March 29th, 1836.

Petitioner shows, that payment has been *amicably* demanded of defendant, and refused. Wherefore he prays, that said Lewis Cruger be cited to appear and answer this petition, and, after due proceedings had, be condemned to pay petitioner the sum of $5,300 with interest, as prayed for, costs of court, and all other relief.

(Signed) ELMORE & KING,
Plaintiff's Attornies.

Exhibit.

MONTGOMERY, *March* 29, 1836.

Twelve months after date, I promise to pay to William H. Taylor, Esquire, or order, five thousand three hundred dollars, for value received, with interest until payment, from date.

LEWIS CRUGER.

Endorsed,
WM. H. TAYLOR.

CIRCUIT COURT OF THE UNITED STATES,
Ninth Circuit, Eastern District of Louisiana.

Be it remembered, that on the 11th day of April, in the year of our Lord one thousand eight hundred and thirty-eight, W. H. Taylor came into court, by his attornies, Elmore & King, Esquires, and filed the following petition, to wit:

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For that petitioner is the owner and holder of a promissory note, executed by defendant in favor of petitioner; which said note is herewith attached for reference, by which he, defendant, promised, twelve months after date, to pay petitioner five thousand three hundred dollars, with interest from date till payment—said note dated March 29th, 1836.

Petitioner shows, that payment has been *amicably* demanded of defendant, and refused. Wherefore he prays, that said Lewis Cruger be cited to appear and answer this petition, and, after due proceedings had, be condemned to pay petitioner the sum of $5,300 with interest, as prayed for, costs of court, and all other relief.

(Signed) ELMORE & KING,
Plaintiff's Attornies.

Exhibit.

MONTGOMERY, *March* 29, 1836.

Twelve months after date, I promise to pay to William H. Taylor, Esquire, or order, five thousand three hundred dollars, for value received, with interest until payment, from date.

LEWIS CRUGER.

Endorsed,
WM. H. TAYLOR.

And on the same day, a citation, issued in the words following, to wit:

W. H. TAYLOR
vs.
LEWIS CRUGER.

The delay expressed in the body of this citation is increased one day for every ten miles the defendant's residence is distant from the place where the court is held.

(Signed) T. W. COLLENS, *Dep. Clk.*

The President of the United States of America, to the Marshal of the Eastern District of Louisiana, or his lawful deputy, greeting:

You are hereby commanded to cite Lewis Cruger, in the east district of Louisiana, to comply with the demand contained in the petition, (of which a copy accompanies this citation,) or to be and appear at the circuit court of the United States for the eastern district of Louisiana, to be holden in the city of New Orleans on the 10th day after service hereof, to answer to the complaint of W. H. Taylor; and that he do file his defence or answer with the clerk of said court on or before the same, or judgment will be given against him by default; and have you then and there this writ.

Witness, the Hon. R. B. Taney, Chief Justice of the Supreme Court of the United States, at the city of New Orleans, this the eleventh day of April, 1838, and sixty-second year of the independence of the United States.

(SEAL.) T. W. COLLENS, *Dep. Clk.*

Marshal's Return.

Received, Wednesday, 11th day of April, 1838, by direction of the plaintiff's attorney, the within citation; and copy of plaintiff's petition was served on M. M. Cohen, Esq., April 18th, 1838, who accepted service as attorney for defendant. See endorsement hereon. Returned April 18, 1838.

J. H. HOLLAND, *Marshal.*

Service accepted April 18, 1838.

M. M. COHEN, *Def't's Att'y.*

Defendant's Answer, filed 8th May, 1838.

To the Honorable the Circuit Court of the United States for the Ninth Circuit, sitting in the Eastern District of Louisiana:

The answer of Lewis Cruger to the petition of William H. Taylor, citizen of Alabama, respectfully represents, that in the month of March, 1836, this defendant, having purchased lands in

the State of Louisiana, went on to Montgomery, Alabama, where he was then planting, to purchase negroes for his said lands in Louisiana; that, whilst he was looking at negroes offered for sale by the negro traders in Montgomery, he met the *petitioner*, who was then planting near him, in Alabama, and who informed him that he could sell him some negroes very low, as he had bought them at a low price, but a short time before, from a negro trader, by taking all the said trader then had on hand; that they were more than he wanted—being twenty-two in number, and he had only required six or seven workers in addition to his former force—but had been induced to buy these from the low price at which they had been offered him by this trader, whom he had known for a long time. This defendant enquired, why the said negroes were sold so low; and whether they were sound, good negroes. To which the said petitioner replied, that he knew nothing to the contrary, as they had been in his possession so short a time that he could give no particular description of them; but they had been sold low because several of them were above 40 years of age, and they were the last of a large gang. The said petitioner requested this defendant to ride out to his plantation, a few miles from Montgomery, and see the said negroes; which they accordingly did, and the said negroes appeared to be in good health and condition, though several of them were evidently beyond 40 years of age. The said petitioner said, that he would sell them as he had bought them, and just transfer the bill of sale he had received for them; in which bill of sale there appeared no mention of unsoundness, nor in a memorandum, which the said petitioner handed to this defendant, and which this defendant believed to be in the hand-writing of the said *petitioner*. And this defendant, being in great haste to return to Louisiana with negroes to plant his crop, and having every confidence in dealing with a gentleman with whom he had always been on friendly terms, and as the prices of the negroes appeared to be proportioned to their ages, he agreed to take them without a further examination; and requested the said petitioner to send them into Montgomery in time, for the steamboat expected to start the next day—which the said petitioner accordingly did. And this defendant took them with him, in the first steamboat, having settled with the said petitioner, by paying him one-half in cash, and giving him a note for $5,300 dollars, as set forth in the said petition.

This defendant further represents, that as soon as he reached his plantation, in Louisiana, and set the said negroes to work, his overseer discovered that five of them were incapable of working, from the most serious physical defects, which appeared to be of long standing, namely: that two of the females were severely afflicted with fallen wombs, of long duration; another of them was subject to a species of epilepsy, and an idiot; another was suffering from chronic rheumatism; and one of the men was afflicted with a rupture, of long standing. In addition to these, one of the boys was constantly in bad health, and could work but little. This defendant,

on learning these defects, sent for the physician who was practising in that parish, and, upon being assured of the true character of these diseases, informed the said petitioner thereof, and stated to him, that he could not pay him the amount due for the said negroes without a reasonable deduction, as the consideration of the said note had failed to that extent.

This defendant further represents, that he has repeatedly offered to make a reasonable settlement with the said petitioner on receiving a fair deduction for the unsoundness of said negroes, but the said petitioner has not agreed to such settlement; and this defendant now prays for a jury and all relief from this honorable court, upon a full investigation of the said case, and that he may be discharged from this suit at plaintiff's costs, and so forth.

(Signed) M. M. COHEN, *Def'ts Att'y.*

Endorsed—Filed 8th May, 1838.

(Signed) T. W. COLLENS, *D'y Clerk.*

Supplemental Answer filed May 19, 1838.

WM. H. TAYLOR
vs.
LEWIS CRUGER.

To the Honorable the Circuit Court of the United States for the ninth circuit, sitting in and for the eastern district of Louisiana:

The supplemental answer of Lewis Cruger, the defendant, respectfully shows that, for the purpose of more particularly designating the names of said negroes so afflicted with disease, and the amount or extent of failure of consideration of the note aforesaid, he subjoins the following statement, to wit:

1. The negro woman Maria, epileptic and idiot, charged in said lot at $700, valueless.

2d. The negro man Yorick (about 44 years) ruptured, charged at $650, worth only $300.

3d. Negro boy Peter (about 18 years) dropsical, charged at $800, worth $300.

4th. Negro woman Sally (about 47 years) fallen womb, charged at $400, valueless.

5th. Negro woman Lissey (about 48) fallen womb, charged about $400, valueless.

6th. Negro woman Onia (about 40) rheumatic, charged at about $400, valueless.

The defendant further says, that he is prepared and willing to keep said slaves who have some value, as above stated, at their true and real value, as above stated, and that he is prepared to return those that are utterly worthless, as above stated, the same being only an expense and incumbrance to him; that from the foregoing statement, it results that there has been a failure of consideration in said

purchase, and the amount of the note therefor given to the extent of $2,750, and that defendant can only be held liable for the excess of said note over and above said amount; that, by the terms of said purchase, said vendor and plaintiff is fully bound to guarantee and indemnify this defendant against said vices which have thus materially affected, or entirely destroyed, as above stated, the value of said negroes; and that these vices existed long anterior to said sale, were well known to said plaintiff, and unknown to this defendant, who would not have purchased them had he known the existence of said vices and diseases; wherefore, this defendant, still adhering to the allegations of his original, and praying that the allegations of this, his supplemental answer, be therewith embodied, and that all the matters by this defendant pleaded be tried by a jury, prays to be hence dismissed with costs.

(Signed) M. M. COHEN,
THOMAS SLIDELL,
For Def't.

Endorsed—Filed May 19th, 1838.
(Signed) DUNCAN N. HENNEN, *Clerk.*

Consent for Commission—(Filed 10th Sept. 1838.)

MR. COLLENS:

I wish a commission to take the testimony of witnesses residing in or near Montgomery, Alabama, in the case of Wm. H. Taylor *vs.* Lewis Cruger, pending in the circuit court. Testimony to be taken before any judge or justice.

(Signed) W. W. KING.

I consent to the issuing of the commission in this case without affidavit.

(Signed) T. SLIDELL, *for Def't.*

Endorsed—Filed 10th September, 1838.
(Signed) T. W. COLLENS, *D'y Clerk.*

Verdict and Judgment.

This case came up for trial; whereupon appeared the following jurors, to wit:

1. S. Shakespeare,
2. J. E. Jolly,
3. A. Reiffel,
4. C. Paulding,
5. N. Harrington,
6. James Jenkins,
7. J. H. Leverich,
8. J. G. Walton,
9. J. N. Cardoza,
10. Thomas Loney,
11. Charles Stevenson.
12. J. M. Webber,

who were duly sworn and empaneled according to law. The court then appointed Charles Stevenson their foreman. After evidence

and argument of counsel, they retired to consider of their verdict, and returned with one in the words and figures following, to wit:

We find a verdict for the plaintiff for the sum of five thousand three hundred dollars, with interest at 8 per cent. from 29th March, 1836.

(Signed) CHARLES STEVENSON, *Foreman.*

New Orleans, 9th April, 1839.

Whereupon, it is considered by the court here, that judgment be entered up in favor of the plaintiff, and against the defendant, for the sum of five thousand and three hundred dollars, with interest thereon at the rate of eight per cent. per annum, from the 29th March, 1836, according to said verdict and costs of suit to be taxed.

Judgment entered April 9, 1839.

Judgment signed May 24, 1839.

P. K. LAWRENCE, *U. S. Judge.*

Bill of Exceptions.

TAYLOR *vs.* CRUGER.

At the trial of this cause, the defendant objected to go to trial, because, this cause having been set on Tuesday, 2d April, on this day, the 9th April, they have, on the 4th April, caused a supbœna to be issued to —— Ford, residing within 100 miles of New Orleans; that the marshal never attempted to make any service of this subpœna; that they also caused subpœna to be issued to Desalle, of New Orleans, which subpœna was reasonably left at said Desalle's domicil, as by the return of the marshal appears, and the court refused to issue an attachment to obtain the attendance of said witness, Desalle, and directed the trial to proceed; the court refused to grant attachment, because the service of the summons on the witnesses *were* not personal, and refused the continuance tender: no showing was made of the materiality of the testimony.

Thereupon defendant, by his counsel, offered this bill of exceptions, and prayed the court to sign the same.

CLERK'S OFFICE U. S. CIRCUIT COURT,
East District of Louisiana.

NEW ORLEANS, April 10, 1839.

I certify the foregoing to be a true copy of the original on file.

(Signed) J. G. A. HOIT, *Dpt. Clk.*

DISTRICT COURT OF THE UNITED STATES
for the Eastern District of Louisiana.

The President of the United States to John B. Ford:

You are hereby commanded to be and appear before the circuit court of the United States for the said district, to be holden at the city of New Orleans, on the ninth day of April, , then and there to testify the truth, according to your knowledge, in a certain case now depending therein, and to be tried between W. H. Taylor and Lewis Cruger, at 10 o'clock, A. M. And herein fail not under the penalty of two hundred and fifty dollars.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of New Or-
(SEAL.) leans, this, the fourth day of April, in the year of our Lord one thousand eight hundred and thirty-nine, and in the 63d year of American Independence.

(Signed) J. G. A. HOIT, *Dpt. Clk.*

Testimony taken under Commission, filed March 5, 1839.

CIRCUIT COURT OF THE UNITED STATES
for the 9th Circuit Eastern District of Louisiana.

To any Judge or Justice of the Peace in or near Montgomery, Alabama:

Know ye, that reposing special trust and confidence in your integrity and ability, we hereby authorize and require you that you call and cause to come before you certain witnesses, and them duly examine, on oath, touching and concerning certain matters and things in a cause now depending in the said court, wherein William H. Taylor is plaintiff, and Lewis Cruger is defendant; and the same examinations, so taken and reduced to writing, you certify, under your hand and seal, and send enclosed to this court, without delay, to be read in evidence on trial of said cause; and send also this writ.

Witness the Honorable R. B. Taney, Chief Justice of the Supreme Court of the United States at the city of New Orleans, this
(SEAL.) 10th day of September, anno Domini 1838, and the 63d year of the Independence of the United States of America.

(Signed) T. W. COLLENS, *Dep'y Clk.*

Interrogatories to be propounded, under oath, to Jesse J. Taylor and other witnesses, residing at or near Montgomery, Alabama, by virtue of the annexed commission, issued from the circuit court of the United States in and for the eastern district of Louisiana, to any judge or justice of the peace in Montgomery aforesaid; the answers to be used as evidence in behalf of the plaintiff, in a cause pending in the said circuit court, in which Wm. H. Taylor is plaintiff, and L. Cruger is defendant:

Int. 1. Are you acquainted with the parties to the above suit?

Int. 2. Do you know any thing of a sale of negroes made by

Wm. H. Taylor, the plaintiff, to the defendant, sometime in the spring of 1836? If so, state all that you know about said sale. When did it take place? What was the number of negroes, what the terms of the sale, and the price agreed upon?—was that price reasonable?—was it not very low for negroes of the description sold at that time? At whose solicitation did the sale take place?

Int. 3. How long had Mr. Taylor owned those negroes before he sold them to Cruger? Had he an opportunity of becoming well acquainted with them during that time? How far were they from Mr. Taylor's residence during the time? What was the condition of the negroes at the time of the sale, and were they not worth the money agreed to be given for them?

Int. 4. Were the said negroes warranted by the said Taylor? Had not Cruger as good an opportunity as Taylor of learning the true condition of the negroes? Did he not examine them before taking them, and did he not take them as they were, without warranty?

Int. 5. Have you ever heard Cruger say any thing in relation to this purchase?—state when, and where, and what he said.

Int. 6. Were you present at a conversation which took place between Mr. Wm. H. Taylor and Cruger, some time in November or December of the year 1837?—state what that conversation was. Did Mr. Cruger then object to paying the amount of the note he had given Mr. Taylor, upon the ground that the negroes were afflicted with diseases which rendered them worthless? Did he not promise to pay Mr. Taylor the amount he owed him? What was said about the boy Tony, who had run away before Mr. T. could deliver him? Was he ever delivered?

Int. 7. State any thing else you know which may enable the plaintiff to recover from the defendant the amount he owes him.

The following interrogatories are to be propounded as the above, and under the same authority, to persons learned and experienced in the law:

Int. 1. What is your profession?

Int. 2. What system of laws are in force in the State of Alabama, the common or civil law?

Int. 3. Are negro slaves regarded in Alabama as personal or real property?

Int. 4. In a sale of personal property in Alabama, in which nothing is said in relation to warranty, or without warranty, and where the vendee had a good opportunity of examining for himself the property sold, and did examine it, by what implied warranties is the vendor bound? Is he bound for any except title? Is he considered to have warranted the property against vices or defects of the existence of which he was ignorant? Is he bound to make good any defects or vices in the property, unless he has resorted to artifices and falsehood to deceive and defraud the vendee?

Int. 5. What construction would you put on a sale of negroes made by a general assignment of all interest endorsed on the back of another bill of sale, which bill of sale itself contained no warranty? Would that constitute a sale, with warranty, or not?

Int. 6. What acts or circumstances, in Alabama, amount to a waiver of rights secured by warranty? Would not a promise on the part of the vendee, after he had discovered defects which were covered by the warranty, to pay the vendor the full price of the sale without any reservation, amount to a waiver of the warranty?

(Signed) ELMORE & KING,
Attorneys for Plaintiff.

The defendants, reserving all legal exceptions, propound the following cross-interrogatories to all the witnesses to be examined under this commission:

Cross-Interrogatories.

1. What is your age? What your occupation?
2. Was the sale of negroes, referred to in plaintiff's 2d interrogatory, a verbal or a written one? if written, produce the act of sale or an authenticated copy. Did you see and examine all the slaves? state their ages, names, and description.
3. Did Taylor purchase said slaves by written conveyance, or bill of sale? if so, annex it or an authenticated copy thereof. When did you last see said negroes, and where?
4. If you speak as to warranty, or non-warranty, state fully and particularly when, how, and where, you learned the terms of sale. Was it not from Taylor himself?
5. If you depose as to any principles or provisions of law existing in Alabama, state whether each and every of the same are written, constitutional, or legislative, provisions or not.
6. How long have you pursued the profession of law, if at all?

Note.—Defendants specially except to interrogatories 2, 3, 4, 6, 4 No. 2, 6 No. 2, as leading.

(Signed) COHEN,
T. SLIDELL,
For Defendant.

THE STATE OF ALABAMA, *Montgomery County:*

By virtue of a commission from the circuit court of the United States for ninth circuit and eastern district of Lousiana, directed to any judge or justice of the peace in or near Montgomery, Alabama, I, Benajah S. Bibb, judge of the county court of the county of Montgomery, State of Alabama, have caused Jesse P. Taylor and George Galdthaite to come before me; and the said witness being duly sworn true answer to make to the interrogatories to said com-

mission, and to tell the truth, the whole truth, and nothing but the truth, Jesse Taylor answering, saith:

To the first interrogatory. He is.

To the 2d interrogatory. A sale took place in the spring of the year 1836. The number of negroes sold by the plaintiff to defendant, at this sale, was twenty-two. The terms of the sale, to the best of my recollection, were about one-half cash, and the balance to be paid, as I think, some time in April, 1837. The price was low at the time for negroes of their appearance, of *of* those sold, and the sale was made at the solicitation of the defendant.

To the 3d interrogatory. Mr. Taylor purchased the negroes a very few days before the sale to Mr. Cruger. Mr. Taylor's residence was about eight miles from his plantation; and during the time he owned them, I presume he could have little information of their condition, other than he could judge from their appearance. Mr. Cruger went down to the plantation of the plaintiff and examined the negroes before he made the purchase. The negroes would, I think, in the Montgomery market, on a sale without warranty, other than that of title, command the price agreed to be paid by Mr. Cruger, say ten thousand eight hundred dollars, with interest.

To 4th interrogatory. The soundness of the negroes were not warranted by Mr. Taylor. Mr. Taylor purchased said slaves without any warranty of soundness, and that fact, as I understand from both parties, was known to Mr. Cruger; their opportunities for becoming acquainted with the true condition of the negroes were, as far as I could judge, about equal.

To 5th interrogatory. Mr. Cruger was staying at my house when he made the purchase of the negroes in the spring of 1836, at Montgomery, Alabama; he consulted me in relation to the making of the purchase, and I advised him not to buy as they were an inferior lot, and not suited to the settlement of a new plantation; to which, he (Cruger) replied that they were so low, and such a bargain, that he would take them.

To the 6th interrogatory. That he was not present at any such conversation.

To the 7th interrogatory. In the spring of 1836, the defendant purchased of the plaintiff twenty-two negroes, for which he agreed to pay ten thousand eight hundred dollars, about one-half cash, and the balance in April, 1837, with interest from date. The purchase was made in Montgomery, Alabama, and the price was low. The negroes would have commanded as much in Montgomery market, without any other warranty than that of title. They were of an inferior description, but, at that time, would have commanded the price agreed to be paid. The plaintiff, in the sale to the defendant, made no warranty of soundness, because he had received none from the person from whom he had purchased, and assigned the same bill of sale which had been made to him to the defendant. They (the negroes) were in the possession of the plaintiff but a very few days before he sold them to the defendant; and during this time, the opportunis for each party for becoming acquainted with the soundness of

the property was, as far as I could judge, about equal. Mr. Taylor, the plaintiff, resided in town, about eight miles from his plantation, where the negroes were, and the defendant was staying at my house, in the same town. He consulted with me in relation to making the purchase, and he went to the plantation of the plaintiff and there examined the said negroes. When he consulted with me, I advised him not to purchase, as the negroes were of an inferior description and not adapted to the settlement of a new plantation; his reply was, in substance, that they were so low, and such a bargain, that he would take them. I know, from information communicated to me by both parties, that, in the sale of which I have been speaking, there was no warranty of soundness by the plaintiff.

Cross-Interrogatories.

To the 1st cross-interrogatory. I am forty-nine years of age, and by occupation a planter. Banets, from whom the plaintiff purchased said negroes, made a bill of sale to him; and he, the plaintiff, assigned said bill of sale, with his receipt under such assignment. This I have understood from both parties.

To the 2d cross-interrogatory. As I have understood from both parties, by a bill of sale, without any warranty of soundness. I have no copy, and have no means of procuring one. I saw the negroes, the last time, the day before they left Montgomery for the defendant's plantation, in Louisiana, in the spring of 1836, a few days after the sale.

3d cross-interrogatory. I learned the terms of sale from both parties at the time of said sale.

(Signed) JESSE P. TAYLOR.

Sworn to and subscribed before me, 10th November, 1838.

(Signed) B. S. BIBB, *J. C. C. M. C.*

And the said George Goldthwaite, answering, saith:

To the 1st interrogatory. I am a practitioner of law in the State of Alabama.

2d interrogatory. The common law is in force in Alabama.

To 3d interrogatory. Negro slaves are in this State regarded as personal property.

To 4th interrogatory. In sales of personal property, the law will not imply a warranty of soundness in the property sold, if none had been expressed; and most certainly if there has been no breach of warranty nor any fraud, either in misrepresenting or suppressing the truth in relation to the quality of the article sold, the vendor is not responsible for any loss or injury that may result from the contract. See Couzzens *vs.* Whitaker, 3d Steward and Porter, 322.

To 5th interrogatory. A general assignment of all interest endorsed upon a bill of sale would convey to the vendee no greater right or interest than was possessed by the original vendee. It

would be regarded as a substitution of the vendee named in such endorsement for the vendee in the original bill of sale. It is questionable if the law would imply a warranty as against the vendor by such general assignment merely, although the original bill of sale contained an express warranty. But in my opinion there can be no doubt that if no warranty was contained in the original bill of sale, the law would not imply it from such general endorsement or assignment.

To 6th interrogatory. If any express warranty was established, I doubt if any act on the part of the vendee would waive the warranty, unless made upon sufficient consideration. A promise by the vendee, after discovery of the defects, to pay the full price, would be strong evidence to show that such defect did not diminish the value of the property. But I do not think that any subsequent promise would waive the warranty, unless founded on a sufficient consideration, and constituting in reality a new agreement.

To cross-interrogatory 1st. I am twenty-nine years of age, and stated my occupation in my first answer.

To the 2d, 3d and 4th ints. I know nothing.

To the 5th. By express legislative enactment, the common law of England is in force in Alabama, except where altered or repealed by statute. The Supreme Court are the constitutional expositors of the law; and my opinion as to a warranty is founded upon their decision in the case I have referred to in my answer to the 4th chief interrogatory. As to the assignment of the bill, and waive of the warranty, we have no decision: I state what I believe to be the common law.

To the 6th. I have pursued the profession of the law in this State for the last ten years.

(Signed) GEORGE GOLDTHWAIT.

Sworn to and subscribed before me, November 10, 1838.

(Signed) B. S. BIBB, *J. C. C. M. C.*

I further certify that the said interrogatories, and their answers, were read distinctly to said witnesses, and that they signed the same in my presence. Given under my hand and seal, this 10th day November, 1838.

(Signed) B. S. BIBB, *J. C. C. M. C.* (SEAL.)

STATE OF ALABAMA,
Department of State, Tuscaloosa, Alabama.

I, Thomas B. Tunstall, secretary of state of the State of Alabama, do hereby certify that Benajah S. Bibb was, on the 10th day of November, 1838, (instant) judge of the county court of Montgomery county, in the State of Alabama.

In testimony whereof, I have hereto set my hand, and affixed the great seal of the State, at Tuscaloosa, this 15th day of November, in the year of our Lord one thousand eight hundred and thirty-eight, and 63d year of American Independence.

(SEAL.)

(Signed) T. B. TUNSTALL,
Secretary of State.

IN THE CIRCUIT COURT U. S.,
Ninth Circuit Eastern District of Louisiana.

WM. H. TAYLOR
vs.
LEWIS CRUGER.

Interrogatories, on behalf of the defendant, to be propounded to Thomas Bufort, Dr. John Pierce, and Thomas May, witnesses to be sworn and examined in this case, now residing in the parish of Terre Bonne:

First—Interrogatories for Mr. Thomas Bufort.

1st. Were you (or not) acting as overseer for Mr. Lewis Cruger, the defendant, in March, April and May, 1836, in the parish of Terre Bonne, La.?

2d. Do you (or not) know that Mr. Lewis Cruger, in March, 1836, went on to Alabama, to purchase negroes for his lands in Terre Bonne parish?—and did he, or not, early in April, return with 22 or 23 negroes from Alabama? What were the names of those negroes?—and did you, or not, understand they were bought of Mr. Taylor, of Alabama?

3d. What were the characters and ages of the oldest among those negroes? State if any of those negroes were affected with diseases, and, if so, what they were; and state whether or not the names of those negroes, or of some of them, were Lissey, Lavey, Maria, Onia, Yorick and Peter, and what were the character, condition and value of those negroes.

4th. State any thing further you know which may be of advantage to the defendant in this case.

Second—Interrogatories for Dr. John Pierce.

1st. Will you, or not, gain or lose any thing by the event of this suit?

2d. Were you, or not, a practising physician in the parish of Terre Bonne, in the year 1836, and did you, or not, practice that year on the plantation of Mr. Lewis Cruger, in that parish?

3d. Did you, or not, examine into the health and condition of certain of the negroes on the said plantation? Were, or not, some

of those negroes named Lissey, Sary, Maria, Onia, Yorick, and Peter? What was then, and is now, the condition, health and value of those negroes? And did you, or not, understand they were bought by Mr. Cruger of Mr. Taylor, in Alabama?

4th. State any thing further you may know of advantage to the defendant in this case, and particularly as to the ages of the negroes that were on said plantation in 1836.

Third—Interrogatories for Mr. Thomas May.

1st. Are you, or not, now acting as overseer for Mr. Lewis Cruger and his partner, on their plantation, in the parish of Terre Bonne, Louisiana, and how long have you been acting as such?

2d. Are, or not, some of the negroes that are now working on, and belonging to, that plantation, named Lissey, Sarey, Maria, Onia, Yorick, and Peter? Describe the condition, health and value of the said negroes, and the ages and names of the oldest belonging to the same gang.

3d. State any thing further you may know respecting said negroes of advantage to the defendant.

(Signed) M. M. COHEN, *Def. Att'y.*

Every exception reserved.

Cross-Interrogatories to be propounded to, and answered by, all the witnesses.

Cross-Int. 1st. How do you know that these negroes were purchased from plaintiff? State, particularly, how you know the fact. Did you ever hear the plaintiff say that he sold these negroes to Mr. Cruger?

Cross-Int. 2d. Do you know any thing of a negro boy, called Toney, belonging to Mr. Cruger, or did belong to him in 1837? From whom did he get said boy? From whom did you ever hear him say he got said negro—from Mr. Taylor, plaintiff in this suit? What did he give for said negro boy? State any thing you know as to manner and circumstances in which this negro came into the possession of defendant. What was his value in 1837?

Cross-Int. 3d. How have these negroes been employed? Have they not been engaged on a sugar plantation ever since you knew them.

(Signed) ELMORE & KING,
Plaintiff's Attorneys.

State every thing you know that would benefit plaintiff.

(Signed) ELMORE & KING, *For Plaintiff.*

Answers of Mr. Thomas Buford to interrogatories in the case of Wm. H. Taylor *vs.* Lewis Cruger, in circuit court of the United States, ninth circuit eastern district of Louisiana:

Answer 1st. I was acting as overseer for Mr. Lewis Cruger in March, April, and May, 1836, in the parish of Terre Bone, Louisiana.

Answer 2d. Mr. Lewis Cruger did, in 1836, (March) go on to Alabama to purchase negroes for his lands in Terre Bone parish, and he did return in April with 22 or 23 negroes from Alabama. The names of these negroes were, Daniel, Linda and child, Peter and daughter Machy, about 11 or 12 years old, Henry and old Louisa, old Winsor and Elinor, and boy Surry, about 10 or 11, Onia and child Robert, Lissey and child Betty, Peter, June, old Peggy and Maria, George, old Sary, boy Dave, about 11 or 12, and Yorick. I did understand they were bought of Mr. Taylor, of Alabama.

Answer 3d. Old Windsor appeared to be near 70, old Peggy appeared to be over 60, Louisa nearly about the same as Peggy, Sarey about 50, June upwards of 50, Lissey about 45, Elinor about the same, the oldest being of very little or no use; Sarey is afflicted with the falling womb, and Lissey the same; Yorick has a bad rupture, Maria is quite an idiot and foolish, Onia has the rheumatism, Peter is a dirt-eater and dropsical. These negroes are of little or no value, but rather an expense to a plantation.

Answer 4th. These negroes were hardly worth their support.

Answers to Cross-Interrogatories.

Answer to 1st. I was informed by Mr. Cruger that he had bought these negroes of Mr. Taylor, of Alabama. I have never seen Mr. Taylor.

Answer to 2d. I was informed by Mr. Cruger that he obtained the negro Toney in place of George, who was dropsical and died on the place. Toney came after I left the place.

Answer 3d. These negroes have been engaged on a sugar plantation since I knew them, but the old and sickly ones did little or nothing.

Answer 4th. Know nothing further.

(Signed) THOMAS BUFORD.

Sworn to and subscribed before me, the undersigned, parish judge of the parish of Terre Bonne, State of Louisiana, this 25th day of February, 1839.

L. BARRAS, *Judge.*

Answers to Interrogatories, by Dr. John Pierce, in the case of William H. Taylor *vs.* Lewis Cruger, in the United States court, ninth circuit eastern district of Louisiana:

Answer 1st. I shall neither gain nor lose by this suit.

Answer 2d. I was a practising physician in the parish of Terre Bonne in 1836, and practised on the plantation of Mr. Lewis Cruger that year.

Answer 3d. I saw the negroes, Sarey, Lissey, Maria, Onia, Yorick, and Peter repeatedly, and found them all diseased: Sarey, with prolapsus uteri, or falling of the womb; Lissey, with prolapsus ani, or

falling of the rectum, and also a partial prolapsus uteri; Maria, with vertigo and imbecility of mind; Onia, with chronic rhuematism; Yorick, with hernia or rupture; Peter, with chronic inflammation of the liver and dropsical effusions. These diseases appear to be of long standing, are obviously incurable, and render the negroes of little value: Sarey is of no value whatever; Lissey, Maria, Onia, and Peter are worth no more than their support; and Yorick, about half of a sound man. Mr. Cruger has frequently informed me, that he purchased them of Mr. Taylor, of Alabama. I have also heard the negroes say, they formerly belonged to Mr. Taylor.

Answer 4th. There are several others on the plantation of Mr. Cruger that are said to have been bought of Mr. Taylor—Winsor, June, Henry, and Louisa, all of whom are of but small value. I do not know their ages; but should suppose that Winsor was over 60, June over 50 years of age, and most of them older than they are stated on a list of their ages that Mr. Cruger has shown me.

Answers to Cross-interrogatories.

1st. Mr. Cruger has frequently told me, that he purchased these negroes of Mr. W. H. Taylor, of Alabama. I never heard Mr. Taylor say any thing about them. I never saw him.

2d. I know the negro boy Toney; and he is now on the plantation of Mr. Cruger, who says he obtained him from Mr. Taylor, in place of a boy, called George, who died of dropsy. He is not of much value.

3d. The plantation on which they live is a sugar plantation, and, when able to work, they are variously employed in doing the lighter kinds of work. But they are so constantly sick that they are not able to do much.

(Signed) JOHN PIERCE.

Sworn to and subscribed before me, this 28th January, 1839.

(Signed) R. M. GRINAGE. *J. P.*

Answers of Mr. Thomas May to interrogatories, in case of Wm. H. Taylor *vs.* Lewis Cruger, in the circuit court of United States, ninth circuit eastern district of Louisiana.

1st. I am now acting as overseer on the plantation of Mr. Lewis Cruger, in the parish of Terrebonne, Louisiana. I have been acting as such since the 1st March, 1838.

2d. There are negroes on said plantation, named Lissey, Sarey, Maria, Onia, Yorick and Peter: Sarey is diseased, with falling of the womb; Lissey, with falling of the lower intestine, and some disease of the womb; Maria is an idiot, sickly, and able to do but little work; Onia is afflicted with chronic rheumatism; Yorick is badly ruptured; and Peter has a diseased liver and dropsical swellings. They have all been diseased, as mentioned, from the time I

have known them, and do not appear likely ever to recover: Sary and Maria are hardly worth their food and clothing; Lissey, Onia, Yorick, and Peter are certainly not worth one good hand, and never can be; Windsor, who is said to have been bought of Mr. Taylor, is probably 70 years of age—he is very old and feeble, and worth nothing; Peggy is apparently 60; and June between 50 and 60; Louisa is probably over 50, and nearly blind.

3d. The negroes above mentioned, except Peter and Yorick, are worth little, if any, more than their keeping.

Answers to Cross-interrogatories.

1st. I have often heard Mr. Cruger say, that the negroes mentioned were bought of Mr. Taylor, of Alabama, and that he bought them as sound. I have also heard the negroes say, they were bought of Mr. Taylor. I never have seen Mr. Taylor.

2d. The boy Toney, now on the plantation, I have heard Mr. Cruger say, was sent to him by Mr. Taylor, in place of a dropsical boy, (George,) who died soon after he was brought to Terre Bonne parish. Toney is about half a hand.

3d. The negroes have been on Mr. Cruger's plantation since I have known them. Sugar is the principal article cultivated; and most of the negroes named are incapable of doing much at the business, or to do regular work of any kind.

(Signed) THOMAS MAY.

Sworn to and subscribed before me, the undersigned, parish judge of the parish of Terrebonne, State of Louisiana, this 25th day of February, 1839.

(Signed) S. BARRAS, *J. P.*

Motion for a new trial—and Marshal's return. Motion filed April 9, 1839.

UNITED STATES CIRCUIT COURT, *Eastern District of Louisiana.*

TAYLOR
vs.
CRUGER.

On motion of Thomas Slidell, of counsel for defendant, it is ordered, that the plaintiff show cause, on Saturday next, the 13th instant, why a new trial should not be granted, on the grounds that the verdict and judgment are contrary to law and the evidence; and also, upon the special grounds mentioned in defendant's bill of exceptions, and the refusal of the case to grant the relief therein stated.

Received April 10, 1839. Served according to law. Returned April 11, 1839.

(Signed) J. P. WALDEN, *Dep. Marshal.*

Application for New Trial. Filed May 20, 1839.

UNITED STATES CIRCUIT COURT,
Ninth Circuit, Eastern District of Louisiana.

TAYLOR
vs.
CRUGER.

On motion of Thomas Slidell and M. M. Cohen, of counsel for defendant, it is ordered, that the plaintiff show cause, on Saturday next, the 27th instant, at 10 o'clock, why a new trial should not be herein granted, on the following grounds:

1st. Because the verdict and judgment are contrary to law and the evidence.

2d. Because the court erroneously compelled the defendant to go to trial, though the marshal had neither summoned nor taken any measures to summon the witness, John B. Ford, living within 100 miles of New Orleans, and for whom, at defendant's instance, a subpœna was duly issued from the clerk's office, and had been seasonably delivered to said marshal—said witness being a material witness for said plaintiff, as by his affidavit, herewith filed and referred to, will fully appear.

3d. Because the court refuses to grant, before proceeding to trial, an attachment against Louis De Saulles, although said witness had been seasonably subpœnaed, as by the return of the marshal appears.

4th. Because, without the fault of this defendant or his counsel, but through a mere error and misrepresentation of one of his counsel of record, defendant has lost the use and advantage at said trial of a document highly material to his defence, as by the said affidavit of defendant, and also by an affidavit of M. M. Cohen, Esq., one of his counsel, herewith filed and referred to, will more fully appear.

5th. Because the granting of a new trial is always within the sound discretion of the court, independent of strict and technical rules; and that in the present case the ends of justice will be promoted by giving the defendant an opportunity of producing all the testimony of which, without his fault or that of his counsel, he has been unfortunately deprived.

(Signed) THOMAS SLIDELL,
M. M. COHEN,
for Defendant.

The following affidavits filed May 20, 1839.

UNITED STATES CIRCUIT COURT,
State of Louisiana, city of New Orleans.

In the case of WM. H. TAYLOR
vs.
LEWIS CRUGER.

Personally appeared Lewis Cruger, before me, J. J. A. Hoit, deputy clerk of the U. S. district court eastern district of Louisiana, who, being duly sworn, deposeth, that John B. Ford, now residing on the Bayou Lafouch, less than 20 miles from Donalsonville, and less than 100 miles from New Orleans, is a material and important witness in this case; and that he could not safely go to trial without him; and that the neglect of the marshal to have the said witness subpœnaed at the last term most probably caused the loss of his case, as the said witness could prove more respecting the unsoundness of said negroes—the subject of his defence in said case—than any of the said defendant's other witnesses.

This deponent further swears, that he placed in the hands of his counsel in this case the bill of sale which he received of the said negroes from the plaintiff, Wm. H. Taylor, and that this important paper was mislaid by said counsel, and not produced at said trial; which doubtless contributed greatly to the loss of his said case.

For which reason, and for others elsewhere specially stated by his counsel, this defendant prays that a new trial may be granted him, to produce said witness and said important document.

(Signed) LEWIS CRUGER.

Sworn to and subscribed before me.
(Signed) HOIT, *Dep. Clk.*
New Orleans, May 15, 1839.

UNITED STATES CIRCUIT COURT,
for the 9th Circuit, sitting in the Eastern Dist. of Louisiana.

WM. H. TAYLOR
vs. No. 294.
LEWIS CRUGER.

Personally appeared M. M. Cohen, who, being duly sworn, deposeth and saith, that defendant deposited with him, as attorney on record in the above case, a bill of sale from plaintiff to defendant, to be used on the trial of said case; that deponent placed said bill of sale on his portfolio of vouchers, without perusing the same; and that at the trial of the cause, finding among the papers in the case a memorandum of negroes and prices, he erroneously presumed that said memorandum was what defendant meant by the term bill of

sale: that some time after the trial of said cause, defendant, who is a resident of Terre Bonne, arrived in this city, from which he was absent during the trial, and enquired for the bill of sale; whereupon deponent exhibited to him the memorandum aforesaid, and thereupon discovered that he had confounded it with the bill of sale, which last, not being among the papers of the case, but in deponent's portfolio of vouchers, had been by deponent forgotten: that said bill of sale is material to defendant's defence, as showing the consideration of the note sued upon was a purchase of slaves which proved to have been defective or worthless before the sale, and as connecting the same with the defence.

(Signed) M. M. COHEN.

Subscribed and sworn to before me, this 20th May, 1839.

(Signed) J. WINTHROP, *Clk.*

Record of Order, the 21st May, 1839.

WM. H. TAYLOR
vs.
LEWIS CRUGER. } No. 294.

The motion for a new trial heretofore made on behalf of defendant was this day argued—Thomas Slidell on behalf of defendant, and Elmore and King on behalf of the plaintiff. Whereupon, after hearing argument of counsel, it was ordered by the court that the said motion be overruled.

Petition for Writ of Error, filed May 31, 1839.

UNITED STATES CIRCUIT COURT,
9th Circuit and Eastern District of Louisiana.

WM. H. TAYLOR
vs.
LEWIS CRUGER.

The petition of Lewis Cruger, defendant in said case, respectfully shows that he is advised there is error to his prejudice in a certain final judgment rendered against him, and signed the 24th day of May, 1839. Wherefore he prays that a writ of error, with supersedeas of execution, or stay thereof, be allowed him to the Supreme Court of the United States, according to law. He files an assignment of errors herewith.

(Signed) COHEN & THOMAS SLIDELL,
for Defendant.

Assignment of Errors.

1st. The defendant was improperly forced to trial.
2d. That the motion for new trial was improperly refused.
3d. That interest was improperly allowed at eight per cent., or at all, between the date of the note and its maturity.
4th. That the judgment is contrary to law.

(Signed) COHEN & SLIDELL,
for Defendant.

Order.

Be it so, the plaintiff in error entering into a bond with surety of William E. Thompson, in the sum of nine thousand dollars, conditioned according to law, and this to operate as a supersedeas.

(Signed) P. K. LAWRENCE, *U. S. Judge.*

Bond—Filed June 3d, 1839.

Know all men by these presents, that we, Lewis Cruger and Wm. E. Thompson, are held and firmly bound unto Wm. H. Taylor in the full and just sum of nine thousand dollars, to be paid to the said Wm. H. Taylor, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this third day of June, in the year of our Lord one thousand eight hundred and thirty-nine.

Whereas, lately at a circuit court of the United States, ninth judicial circuit for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Wm. H. Taylor is plaintiff, and Lewis Cruger defendant, judgment was rendered against the said Lewis Cruger; and the said Lewis Cruger having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit; and a citation directed to the said William H. Taylor, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of January next:

Now the condition of the above obligation is such, that if the said Lewis Cruger shall prosecute his writ to effect, and answer all damages and costs, and satisfy said judgment if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) LEWIS CRUGER, (SEAL.)
W. E. THOMPSON, (SEAL.)

Sealed and delivered in the presence of:
(Signed) DUNCAN N. HENNEN,
(Signed) L. C. HORNSBY.

Verdict of the Jury on the back of the original petition, as follows:

We find a verdict for the plaintiff for the sum of five thousand three hundred dollars, with interest at 8 per cent. from the 29th March, 1836.

(Signed) CHARLES STEVENSON, *Foreman*.

New Orleans, 9th April, 1839.

CLERK'S OFFICE, CIRCUIT COURT OF THE U. S.
Ninth Judicial Circuit and Eastern Dist. of Louisiana.

I, Allen Pierse, deputy clerk of said court, do hereby certify that the foregoing thirty-four pages do contain a full, faithful and complete transcript of the record of the pleadings, process, evidence, proceedings and other matters relating to the suit of William H. Taylor *vs.* Lewis Cruger, in this court, (No. 294,) so fully as the same appears from the records of the court in my office.

Witness my hand, and the seal of the court, at the city of New
(SEAL.) Orleans, this twenty-fifth day of September, A. D. eighteen hundred and thirty-nine.

A. PIERSE, *Dep. Clk.*
For D. N. HENNEN, *Clk.*

The address to the court in the beginning of the petition on first page will be found on the margin. A. P., *Dep. Clk.*

I, Philip K. Lawrence, one of the judges of the circuit court of the United *States* for the ninth circuit in the eastern district of Louisiana, do certify that Allen Pierse, who signed the certificate on the other side of this leaf, is the deputy clerk of said court, and that full faith and credit are due, and of right ought to be given, to his attestations as such; and that the within attestation is in due form, and was signed by the said Pierse, while deputy clerk as aforesaid.

Witness my hand, this 2d day of October, 1839.

P. K. LAWRENCE, *U. S. Judge.*

The United States of America to William H. Taylor, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the ninth judicial circuit and eastern district of Louisiana, wherein Lewis Cruger is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this seventeenth day of
(SEAL.) June, in the year of our Lord one thousand eight hundred and thirty-nine.

P. K. LAWRENCE, *U. S. Judge.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States, Ninth Judicial Circuit and Eastern District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between William H. Taylor, plaintiff, and Lewis Cruger, defendant, a manifest error hath happened, to the great damage of the said Lewis Cruger, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the second Monday of January next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, the second Monday of
(SEAL.) January, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-third.

DUNCAN N. HENNEN,
Clerk Cir. Court U. S., East. Dist., La.

711.

SUPREME COURT OF THE UNITED STATES.

No. 64.

JOSEPH SWIFT, PLAINTIFF,

vs.

GEORGE W. TYSEN.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. SOUTHERN DISTRICT OF NEW YORK.]

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Tuesday, the seventh day of January, in the year of our Lord one thousand eight hundred and forty.

Present:

The honorable SMITH THOMPSON and
SAMUEL R. BETTS.

JOSEPH SWIFT, a citizen of the State of Maine,
vs.
GEORGE W. TYSEN, a citizen of the State of New York.

The action in this case was one of assumpsit for a sufficient amount to give the court jurisdiction of the case, and was brought by the plaintiff as first endorsee against the defendant as acceptator of a bill of exchange, dated at Portland, May 1st, 1836, and payable six months after date and grace, drawn by Jairus S. Keith, and Nathaniel Norton in favor of the order of said Norton, and by him endorsed to the plaintiff at Portland about five months before it became due, and drawn upon and accepted by the defendant at the city of New York, and so accepted by him previous to its being so endorsed to the said plaintiff. The question being presented for the consideration and decision of said judges, whether under the facts and evidence in this cause the defendant was entitled to the same defence as against the plaintiff in this action, as he would be entitled to as

against the original parties to said bill, the following preliminary point or question of law arose, that is to say:

"Whether under the 34th section of the judiciary act, the act of Congress entitled 'An act to establish the judicial courts of the United States,' approved September 24th, 1789, the law settled by the adjudications of the courts of the State of New York is the rule of decision in this court in respect to the rights of the plaintiff as endorsee of the said bill of exchange."

Upon which last-mentioned specified point or question of law, the said judges of this court divided in opinion, one of them being in the affirmative, and the other in the negative, on said point or question.

And thereupon, on the same seventh day of January, 1840, the said point or question of law was, at the request of the counsel for the said plaintiff, stated as above, under the direction of the said judges of this court, to be certified under the seal of this court to the Supreme Court of the United States, at the next session thereof to be held thereafter, to be finally decided by said last mentioned court.

FRED. J. BETTS, *Clerk*.

712.

SUPREME COURT OF THE UNITED STATES.

No. 67.

THE UNITED STATES *vs.* ISAAC MORRIS.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF N. YORK.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the City Hall of the city of New York, on Saturday the thirtieth day of November, in the year of our Lord one thousand eight hundred and thirty-nine,

Present: The Honorable SMITH THOMPSON, and SAMUEL R. BETTS.

THE UNITED STATES OF AMERICA
vs.
ISAAC MORRIS.

The defendant, Isaac Morris, is indicted under the second and third sections of the act entitled "an act in addition to an act entitled 'an act to prohibit the carrying on the slave trade from the United States to any foreign place, or country,'" approved on the 10th of May, 1800.

The first count of the indictment charges that the defendant did, on the high seas, from the fifteenth day of June until the 26th day of August, in the year 1839, voluntarily serve on board of the schooner Butterfly, a vessel of the United States, employed and made use of in the transportation of slaves from some foreign country or place to some other foreign country or place, the said defendant being a citizen of the United States.

The second count charges, that the defendant did, on the high seas, from the fifteenth day of June to the 26th day of August, voluntarily serve on board of the schooner Butterfly, being a foreign vessel employed in the slave trade; the defendant being a citizen of the United States.

It was proved, on the trial, on the part of the prosecution, that the schooner Butterfly, carrying the flag of the United States, and documented as a vessel of the United States, (her register being dated the 24th day of May, 1839, and issued by the collector of New Orleans

to Nathan Farnsworth, a citizen of the United States, as owner,) was boarded and examined, on the twenty-sixth day of August, 1839, on the high seas, in latitude 5° 25′ north, longitude 30° east, near Cape St. Paul's, on the coast of Africa, by the British brig of war Dolphin, on suspicion of being a Spanish vessel engaged in the slave trade, in contravention of the treaty between Great Britain and Spain for the suppression of the slave trade. That on such examination, the vessel was found to be on her voyage from Havana, in the Island of Cuba, which port she had left on the 27th day of July, 1839, bound to St. Thomas, in the island of Principe, near the coast of Africa; that the vessel had on board twenty-four large leagers capable of containing each from two hundred and fifty to three hundred gallons of water; eighteen of these were in shocks, that is, the staves were in bundle not fitted; four of them contained water, and two contained bread; there was a quantity of plank stowed away in the hold, similar to the planks used in framing slave decks, but this plank could not have been fitted as a slave deck until the vessel had discharged her cargo; and that such leagers and slave decks were commonly found to be a part of the equipments and fittings of vessels engaged in the slave trade on the coast of Africa; that she had on board a full cargo, consisting of various commodities adapted either to the traffic in negroes, or to any lawful trade carried on by trading vessels upon the coasts of Africa; that the prisoner was in command of the vessel; that he was described in the ship's papers, and represented himself, as a citizen of the United States; that the rest of the ship's company were represented in the crew-list as Spaniards, or Portuguese, who had been shipped at Havana; that there were also on board fourteen Spaniards who had been received at Havana as passengers; that the cargo had been shipped at the same place, and, according to the invoice and bill of lading, was to have been delivered at St. Thomas, in the island of Principe, aforesaid, and appeared, by the documents, to be owned by persons residing at Havana; that two log-books, one in English and the other in Spanish, were found on board; that various documents in the Spanish language were also found on board; that under these circumstances, the vessel was captured by the Dolphin suspecting the same to be Spanish property, and sent for adjudication to Sierra Leone, to be proceeded against in the mixed commission court at that place, which court declined taking cognizance of the case on account of the vessel being documented as an American vessel; that she was then sent to the port of New York to be dealt with by the authorities of the United States as they might think proper.

No slaves were found on board the vessel at the time of her capture; and it was testified by the witnesses for the prosecution, that from the cargo and situation in which the vessel was found, no slaves could have been carried or transported in her at any time during the voyage on which she was then engaged: that it would have been necessary to have discharged the cargo before slaves could have been taken on board: that the vessel was short of water,

having only about eleven gallons on board when she was captured: and that Cape St. Paul's is a common watering place on that coast, being about five hundred miles distant from the island of Principe.

Upon the foregoing state of facts, the judges were divided in opinion upon the four following questions, which were presented on the facts aforesaid for their decision:

1st. Whether it is necessary, in order to constitute the offence denounced in the second section of the act of the 10th of May, 1800, above referred to, that there should be an ACTUAL transportation or carrying of slaves in the vessel of the United States on board of which the party indicted is alleged to have served.

2d. Whether it is necessary, in order to constitute the offence denounced in the third section of the act of the 10th of May, 1800, above referred to, that there should be an actual transportation or carrying of slaves in a foreign vessel, on board of which the party indicted is alleged to have served.

3d. Whether the voluntary service of an American citizen, on board a vessel of the United States, in a voyage commenced with the intent that the vessel should be employed and made use of in the transporting or carrying of slaves from one foreign country or place to another, is in itself, and where no slaves had been transported in such vessel, or received on board her, an offence under the said second section.

4th. Whether the voluntary service of an American citizen, on board a foreign vessel, in a voyage commenced with the intent that the vessel should be employed and made use of in the transportation and carrying of slaves from one foreign country or place to another, is in itself, and where no slaves had been transported in such vessel, or received on board her, an offence under the said third section.

Which said points, upon which the disagreement has happened, are stated above, under the direction of the said court, at the request of the counsel for the parties in the cause, and ordered to be certified into the Supreme Court of the United States, at the next session, pursuant to the act in such case made and provided.

FRED. J. BETTS, *Clerk.*

714.

SUPREME COURT OF THE UNITED STATES.

No. 69.

THE COMMERCIAL AND RAILROAD BANK OF VICKSBURG, PLAINTIFFS IN ERROR,

vs.

SLOCOMB, RICHARDS & CO.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

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Langtree & O'Sullivan, Print.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the *of the* United States, for the southern district of Mississippi—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Slocomb, Richards, & Co., plaintiffs, and the President, Directors and Company of the Commercial and Railroad Bank of Vicksburg, defendants, a manifest error hath happened to the great damage of the said President, Directors and Company of the Commercial and Railroad Bank of Vicksburg, as by their complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court, the second Monday of January, in the (SEAL.) year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the 64th.

WM. BURNS, *Clerk.*

Issued Dec. 4th, 1839.

UNITED STATES OF AMERICA, *ss:*

To Messrs. Slocomb, Richards & Co., or their attorneys of record, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the

ninth circuit and southern district of Mississippi, wherein the President, Directors and Company of the Commercial and Railroad Bank of Vicksburg are plaintiffs, and you are defendants in error, to shew cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel J. Gholson, one of the judges of the circuit court of the United States for the district of Mississippi, this 27th day of November, in the year of our Lord one thousand eight hundred and thirty-nine, and in the 64th year of the Independence of the United States.

S. J. GHOLSON.

Executed on atto's Paxtons, 2d Dec'r, 1839.

W. M. GWIN, *Marshal.*
By E. H. GREEN, *D. M.*

SLOCOMB, RICHARDS & Co.
vs.
COMMERCIAL AND RAILROAD BANK OF VICKSBURG.

Pleas before the honorable Samuel J. Gholson, district judge of the United States, at a circuit court of the United States, held at the town of Jackson, in and for the ninth circuit and southern district of Mississippi, at the November term, in the year of our Lord one thousand eight hundred and thirty-nine:

Be it remembered, that heretofore, to wit, on the twelfth day of October, in the year of our Lord one thousand eight hundred and thirty-nine, came Slocomb, Richards & Co., by Paxtons, their attorneys, into the clerk's office of the court aforesaid, and sued out the following writ of summons ad respondendum, against the President, Directors and Company of the Commercial and Railroad Bank of Vicksburg, to wit:

UNITED STATES OF AMERICA,
Southern District of Mississippi, ss:

The President of the United States to the Marshal of the Southern District of Mississippi—Greeting:

We command you, without delay, to summon the President, Directors and Company of the Commercial and Railroad Bank of Vicksburg, citizens of the State of Mississippi, resident in the southern district thereof, that they be and appear before the circuit court of the United States, to be held at the town of Jackson, in and for the southern district of Mississippi, on the first Monday of Novem-

ber next, to answer to Cora A. Slocomb, Robert Richards, and Romango W. Montgomery, who are citizens of the State of Louisiana, and partners in trade under the style of Slocomb, Richards & Co., of a plea of trespass on the case, to their damage seven thousand dollars; and that they do file their plea, or defence, with the clerk of said court, on or before the meeting of the same, or judgment will be given against them by default. And have then and there this writ.

Witness the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States, the twelfth day of Octo-
[L. S.] ber, A. D. 1839, and of the Independence of the United States the sixty-*third*.

WM. BURNS, *Clerk*.

Marshal's Return.

"12th Oct. 1839. I then executed this writ on the president of the bank, Wm. H. Benton, Esquire.

WM. M. GWIN, *Marshal*,
By E. H. GREEN, *his Deputy*."

And on the same day of suing out the aforesaid writ, to wit, on the 12th day of October, 1839, came the plaintiffs aforesaid, by their attorneys, and filed their declaration herein, which is in the words and figures following, to wit:

U. S. OF AMERICA, SOUTHERN DISTRICT OF MISSISSIPPI, *ss*:
Circuit Court, November Term, A. D. 1839.

Cora A. Slocomb, Robert Richards and Romango W. Montgomery, who are citizens of Louisiana, and partners in trade, under the style of Slocomb, Richards & Co., by attorney, complain of the President, Directors and Company of the Commercial and Railroad Bank of Vicksburg, who are citizens of the State of Mississippi, living and resident in the southern district thereof, being a banking company incorporated by the Legislature of the State of Mississippi, located in the *sonthern district aforesaid*, who were summoned, &c. of a plea of trespass on the case.

For that whereas the said defendants, by the name of the Commercial and Railroad Bank of Vicksburg, and by the signature of W. H. Benton, President, heretofore, to wit, on the ninth day of October, in the year of our Lord one thousand eight hundred and thirty-nine, at Vicksburg, to wit, in the district aforesaid, made their certain certificate of deposite, in writing, bearing date the day and year last aforesaid, and thereby, then and there acknowledged and declared, that the said plaintiffs, by the name of Slocomb, Richards & Co., had credited said bank for the sum of thirty-five hundred and forty-one dollars and thirty-four cents, deposited by them, the said plaintiffs, in said bank, and subject to the order of the

said plaintiffs, with 8 per cent. per annum interest, and payable upon the return of said certificate; and the said defendants then and there delivered said certificates, so made as aforesaid, to the said plaintiffs for value received. And the said plaintiffs in fact say, that afterwards, to wit, on the 11th day of October, in the year of our Lord one thousand eight hundred and thirty-nine, at the banking-house of the Commercial and Railroad Bank of Vicksburg, at the district aforesaid, the said (certificate) was presented to the teller of said bank, and the payment of the said sum of money therein specified was then and there duly required, according to the tenor and effect of the said (certificate); but that neither the teller of the said bank, nor the said defendants, nor any other person for or on their account, did, or would at that or any other time, either before or since, pay the same, or any part thereof, to the said plaintiffs, but wholly neglected and refused so to do. By means whereof, the said defendants became then and there liable to pay to the said plaintiffs the said sum of money in the said certificate specified, according to the tenor and effect thereof; and being so liable, the said defendants, in consideration thereof, afterwards, to wit, on the 11th day of October, in the year eighteen hundred and thirty-nine, at Vicksburg, to wit, in the district aforesaid, undertook, and then and there promised the said plaintiffs to pay them the said sum of money in the said certificate specified, when they should be thereunto requested.

And whereas, also, the said defendants afterwards, to wit, on the 9th day of October, in the year of our Lord one thousand eight hundred and thirty-nine, at the district aforesaid, were indebted to the said plaintiffs in the further sum of five thousand dollars lawful money of the United States of America, for so much money before that time deposited by the said plaintiffs with the said defendants, and at the special instance and request of said defendants; and for other money, by the said plaintiffs, before that time paid, laid out, and expended for the said defendants, and at the like request of the said defendants; and for other money by the said defendants, before that time had and received, to, and for the use of the said plaintiffs. And being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs, well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when the said defendants should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, accounted together with the said plaintiffs of and concerning divers *others* sums of money before that time due and owing from said defendants to the said plaintiffs, and then and there being in arrear and unpaid; and upon such accounting, the said defendants then and there found to be in arrear and indebted to the said plaintiffs in the further sum of 3,541 dollars and 44 cents of like lawful money as aforesaid. And being so found in arrear and indebted to the said

plaintiffs, the said defendants, in consideration thereof afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendants should be thereunto afterwards requested.

Nevertheless the said defendants, although often requested, &c., to wit, on the 11th day of October, 1839, and oftentimes since, to wit, at the place aforesaid, have not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiffs, but to pay the same, or any part thereof to the said plaintiffs, the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiffs of seven thousand dollars; and therefore the said plaintiffs bring this suit, &c.

W. H. & A. M. PAXTON,
Attornies for Plaintiffs.

Commercial and Railroad Bank of Vicksburg.

Commercial and Railroad Bank of Vicksburg.

[$3,541 34.] VICKSBURG, *October* 9, 1839.

Slocomb, Richards & Co. have credit in this bank for thirty-five hundred and forty-one dollars and thirty-four cents, deposited by them, subject to the order of the said Slocomb, Richards & Co., with interest at 8 per cent. per annum, and payable upon the return of this certificate.

W. H. BENTON,
President.

No. 1,412.

The said defendants, by attorney, come and say that this court ought not to have or take further cognizance of the action aforesaid, because they say that they are a corporation aggregate, and were at the time this suit was instituted, and yet so continued to be; and that their corporators, stockholders, or company, are composed of citizens of other and different States, to wit, that William M. Lambeth and William E. Thompson, citizens of the State of Louisiana, are now, and were at the time this suit was instituted, stockholders and corporators therein.

And this the said defendants are ready to verify. Wherefore they pray judgment whether this court can or will take further cognizance of the action aforesaid.

NORCOM & MASON,
Att'ys for Corporation.

James Roach, acting cashier for the Commercial and Railroad Bank of Vicksburg, the defendants in the above case, makes oath and says, the above plea is true in substance and fact.

J. ROACH.

Sworn to and subscribed before me, this 4th day of November, 1839.

GEO. W. MILLER,
Deputy Clerk.

And the said plaintiffs, as to the plea of the said defendants by them above pleaded, say that the said plea, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar this court from taking further cognizance of their action aforesaid: and that they, the said plaintiffs, are not bound by law to answer the same.

And this they are ready to verify. Wherefore, for want of a sufficient plea in this behalf, they, the said plaintiffs, pray judgment, &c., and that their action may be adjudged good, and properly brought in this court, and that the said defendants may further answer thereto, &c.

And for special causes of demurrer, the plaintiffs assign the following:

1st. The said plea in abatement is not properly entitled of any term of this court.

2d. The affidavit in support of said plea is not sufficient, nor is the same properly attested.

3d. The matters set forth in said plea are not sufficient to abate plaintiff's suit.

PAXTONS, *Pl'ffs' Attys.*

And now, to wit, at a circuit court of the United States, held as aforesaid, on the twenty-third day of November, in the year of our Lord one thousand eight hundred and thirty-nine, came the parties aforesaid, by their respective attorneys. Whereupon all and singular the matters of law arising upon the plaintiffs' demurrer to the defendants' plea afaresaid being argued, and by the court here fully understood, after mature deliberation thereon, it is ordered that said demurrer be sustained. And, the said defendants saying nothing further in bar or preclusion of the plaintiffs' action, whereby the same remains altogether undefended, therefore, it is considered by the court that the said plaintiffs recover against the President, Directors and Company of the Commercial and Railroad Bank of Vicksburg, (the defendants,) the sum of three thousand five hundred and seventy-five dollars and fifty-four cents, for their damages which they have sustained by reason of the premises, and also their costs and charges by them about their suit in this behalf expended.

And the said defendants, in mercy, &c.

UNITED STATES OF AMERICA, SOUTHERN DIST. OF MISSISSIPPI,
Circuit Court of the United States for the said District.

I, William Burns, clerk of the said circuit court, do hereby certify that the foregoing seven pages contain a true, full and complete transcript of the record and proceedings in a certain action of assumpsit lately determined in our said court, between the parties therein named, as fully and completely as the same remains of record in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Jackson, the 3d day of December, A.
(SEAL.) D. 1839, and in the 64th year of the Independence of the said United States.

WM. BURNS, *Clerk.*

719.

SUPREME COURT OF THE UNITED STATES.

No. 71.

THE UNITED STATES, PLAINTIFF,

VS.

SAMUEL R. WOOD.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. SOUTHERN DISTRICT OF NEW YORK.

At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the City Hall, in the City of New York, on Thursday, the nineteenth day of December, in the year of our Lord one thousand eight hundred and thirty-nine.

Present: The Honorable SMITH THOMPSON, & SAMUEL R. BETTS.

THE UNITED STATES OF AMERICA
vs.
SAMUEL R. WOOD.

The defendant was indicted under the revenue collection laws for the crime of perjury, alleged in the indictment to have been committed by him, in swearing to the matters required to be stated in the "owner's oath, in cases where goods, wares, or merchandize, have been actually purchased," prescribed by the fourth section of the act supplementary to, and to amend, an act entitled "an act to regulate the collection of duties on imports and tonnage, passed 2d March, 1799, and for other purposes," approved March 21st, 1823; that oath having been taken by him on the twentieth day of April, one thousand eight hundred and thirty-seven, upon the importation of woollen goods received by him, in the ship Sheridan, from Liverpool, and entered by him, on the said twentieth day of April, as the owner thereof, at the custom-house in the city of New York.

The indictment contained two counts: the first relating to the *entry* referred to in the oath, and the second to the invoice produced and exhibited at the time of making the oath, and referred to therein. In each count there were several assignments of perjury, charging, in substance, that the actual cost of the goods in question was not truly

stated in the said entry and invoice; that the said goods had, in fa and within the knowledge of the defendant, cost more than the prices stated in the said entry and invoice; and that, in entering said goods, he had intentionally concealed and suppressed the true cost thereof, with intent to defraud the United States.

In the progress of the trial, it appeared that the goods in question had been shipped to the defendant by his father, John Wood, of Saddleworth, England, in March, 1837, and that in the invoice produced by the defendant at the time of the entry and referred to in the oath, the goods in question were represented to have been bought by the defendant of said John Wood.

It also appeared, that for several years before and for some time after the importation by the Sheridan, the defendant had been in the habit of receiving woollen goods from his said father, which were entered by the defendant at the custom-house, in the city of New York, upon the oath of defendant, as owner, and upon the production of invoices representing the goods to have been sold to the defendant by the said John Wood.

One package out of every invoice of the goods entered by defendant, including the goods in question, had been inspected by the officers of customs; and all the packages in each invoice had been admitted at the cost-prices stated in the invoices, and the duties on such cost-price duly paid on the same.

It appeared, from the testimony of the inspectors of the customs, that the packages designated for inspection, according to their examination and judgment, were not valued in the invoices beyond the actual cost of similar goods imported by other persons.

No witnesses were produced on the part of the prosecution to testify to the actual cost of the goods in question, at the time and place, when and where, they were purchased. But the counsel for the United States, to prove the charge in the indictment, to wit: that the goods in question actually cost, to the knowledge of the defendant, more than the prices stated in the invoice, offered and proved certain documentary evidence, consisting of an invoice book of the above named John Wood, and of thirty-five original letters from the defendant, Samuel R. Wood, to the said John Wood, written between April, 1834, and December, 1837; and it was alleged, on the part of the prosecution, that this proof disclosed a combination between Samuel R. Wood and John Wood to defraud the United States, by invoicing and entering the goods shipped at less than their actual cost; and also disclosed that this combination extended to the shipment by the Sheridan, and that the goods received by that vessel had cost, as defendant knew when he entered the same, more than the prices stated in the invoice produced, and in the entry made by him.

The counsel for the defendant objected to the competency of such proof to convict of the crime stated in the indictment, and insisted that, even if an inference of guilt could be derived from such proof, it was an inference from circumstances not sufficient as the best legal testimony to warrant a conviction.

That the legal testimony required to convict of perjury in this case was the testimony of at least one living witness, to disprove the truth of the defendant's oath, as to the actual cost of the goods, at the time and place of exportation.

That until such proof was adduced, the documentary evidence produced by the counsel of the United States did not constitute the legal evidence upon which the defendant could be convicted of the perjury charged in the indictment.

The question being discussed, the judges were divided in opinion on the point:

Whether it was necessary, in order to convict the defendant of the crime charged in the indictment, to produce, on the part of the prosecution, at least one living witness, corroborated by another witness, or by circumstances to contradict the oath of the defendant.

Which said point, upon which the disagreement has happened, is stated above, under the direction of the said court at the request of the counsel for the parties in the cause, and ordered to be certified into the Supreme Court of the United States, at the next session, pursuant to the act in such case made and provided.

FRED. J. BETTS, *Clerk.*

721.

SUPREME COURT OF THE UNITED STATES.

No. 74.

JEFFERSON L. EDMONDS, ET AL., PLAINTIFFS IN ERROR,

vs.

ANDERSON CRENSHAW.

IN ERROR TO THE CIRCUIT COURT UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

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Langtree & O'Sullivan, Print.—1840.

UNITED STATES OF AMERICA,
Circuit Court of the United , *Ninth Judicial Circuit,*
Southern District of Alabama.

JEFFERSON L. EDMONDS, et al.
vs.
ANDERSON CRENSHAW.

The President of the United States, to the Marshal of the Southern District of the State of Alabama, Ninth Judicial Circuit, greeting:

Whereas Jefferson L. Edmonds and Dorothy Ann, his wife, Robert H. Spencer and Sarah, his wife, lately Sarah S. F. Wadlington, and who has intermarried with the said Robert H., and Minor W. Gracy and Mary, his wife, lately Mary B. Wadlington, did, on the thirteenth day of August, in the year eighteen hundred and thirty-six, file their petition in the district court of the United States for the district aforesaid, praying an appeal to the Supreme Court of the United States from the decree of the said district court for the district aforesaid, so that the decree and proceedings had in the said district court at the December term, 1829, of said court in a certain suit in chancery then determined, and before that time pending in said court, wherein Jefferson L. Edmonds and Dorothy Ann, his wife, Dorothy Wadlington, and the infants Polly B. Wadlington and Sarah S. F. Wadlington, who, sued by Dorothy Wadlington, their next friend and guardian ad litem, were complainants, and Anderson Crenshaw was defendant; and in which said appellants allege and set forth certain causes why the said appeal should be allowed, and have prayed a citation to the said Anderson Crenshaw, so that he may appear in our said Supreme Court of the United States, to answer and defend against said appeal. Upon which appeal, no citation having been heretofore granted, and we being willing that said appeal be allowed, the marshal of the southern district of Alabama is therefore required to cite and admonish the said Anderson Crenshaw, if to be found in his district, that he be and appear before the honorable the Supreme Court of the United States of America, before the judges of said court, at the next term thereof, to be held at the city of Washington, on the second Monday of January next, then and there to show cause, if any there be, why the said appeal should not be heard, and said decree and proceed-

ings be reviewed and examined, by said Supreme Court, and speedy justice done in the premises according to law.

Witness the Honorable John McKinley, one of the associate justices of said court, and judge of the ninth judicial circuit of the United States, at Mobile, Alabama, this fifteenth day of May, in the year eighteen hundred and thirty-eight.

J. McKINLEY, *Associate Justice of the Supreme Court of the U. S.*

To ROBERT L. CRAWFORD,
Marshal of the Southern District of Alabama,
Ninth Judicial Circuit of the U. S.

UNITED STATES OF AMERICA,
District Court of the United States
for the Southern District of Alabama.

The President of the United States to the Clerk of the said District Court, greeting:

Because, in the record and proceedings, and also in the rendering of a decree and judgment, in a certain proceeding in chancery, had in a district court of the United States, held in and for the southern district of Alabama, in a bill filed in said court, wherein Jefferson L. Edmonds and Dorothy Anne, his wife, Dorothy Wadlington, Polly Brooks Wadlington, and Sarah Susannah Frances Wadlington, (the said Polly and Sarah sueing by their next friend and guardian ad litem, Dorothy Wadlington,) were complainants, and Anderson Crenshaw was defendant; and wherein, at the term of said district court, held at Mobile, on the second Monday of December, 1829, a decree was rendered for the said defendant, as it is said, manifest error hath intervened, to the great injury of the said complainants, as we are informed, by the complaint of Jefferson L. Edmonds and Dorothy Ann, his wife, Robert H. Spencer and Sarah, his wife, (lately Sarah S. F. Wadlington, and who hath intermarried with the said Robert H.,) Minor W. Gracy and Mary, his wife, (lately Mary B. Wadlington); the said Dorothy R. Wadlington having departed this life since the rendering of said decree; (the said Sarah and Mary being infants, under the age of twenty-one years, at the time of the rendition of said decree, and the said Sarah, as well as the other parties, complaining of the said errors within five years after she, the said Sarah, hath attained the full age of twenty-one years,) who further inform us, that they have sustained injury by the rendition of said decree, in which they are interested as aforesaid, as they allege. We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then, without delay, you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all

things touching the same, to our Supreme Court of the United States, before the honorable Chief Justice of the United States and the associate judges of said court, at the next term thereof, to be held on the 2d Monday in January next, at the capitol, in the city of Washington, together with this writ; that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right, and the law of the land, for the said errors, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of said district (SEAL.) court, this second Monday of January, in the year of our Lord one thousand eight hundred and thirty-six.

Issued this 13th day of August, A. D. 1836.

Attest: DAVID FILES,
Clk. So. Dist. Ala.

Bond.

DISTRICT COURT OF THE UNITED STATES,
for the S. District of Alabama.

Know all men by these presents, that we, Jefferson L. Edmonds, Dorothy R. Wadlington, William Bowen and P. Rutherford, are held and firmly bound unto Anderson Crenshaw, his heirs, executors, administrators and assigns, in the sum of five hundred dollars; for the payment of which, well and truly to be made, jointly and severally, we, and each of us, bind ourselves, and each of our joint and several heirs, executors, administrators and assigns, firmly by these presents; sealed with our seals, and dated this fifth day of September, in the year of our Lord one thousand eight hundred and thirty-six.

The condition of the above obligation is such, that whereas the above bound Jefferson L. Edmonds, who sues in right of his wife and the other complainants therein mentioned, have, on the 13th day of August, in the year of our Lord 1836, sued out and obtained a writ of error from the court aforesaid to the Supreme Court of the United States, in a certain cause lately pending before said court, wherein said Jefferson L. Edmonds, Dorothy Ann, his wife, Dorothy Wadlington, Polly B. Wadlington, and Sarah S. F. Wadlington, were complainants, and Anderson Crenshaw and James McMorris were defendants: now, if the said Jefferson L., Dorothy Ann, his wife, Dorothy, Polly B. and Sarah S. F. shall prosecute to effect their said writ of error, in the Supreme Court of the United States, and shall pay and satisfy such order, judgment or decree as the said Supreme Court shall make or render in the premises, then this obli-

gation to be void; otherwise, to be and remain in full force and effect.

JEFFERSON L. EDMONDS. (SEAL.)
DOROTHY R. WADLINGTON, (SEAL.)
WM. BOWEN, (SEAL.)
PHŒDRUS RUTHERFORD, (SEAL.)

In presence of
REUBEN RUFF.

Pleas had before the Honorable the District Court of the United States for the Southern District of Alabama, at a term thereof begun and held in and for said District, at Mobile, on the second Monday of December, in the year of our Lord one thousand eight hundred and twenty-nine, before his Honor William Crawford, Judge of the said Court:

Be it remembered, that heretofore, to wit, on the twenty-second day of March, in the year of our Lord one thousand eight hundred and twenty-seven, Jefferson L. Edmonds, Dorothy Ann Edmonds, Dorothy Wadlington, Polly Brooks Wadlington, and Sarah Susannah Frances Wadlington, filed in the clerk's office of said court their bill of complaint against Anderson Crenshaw, in the words and figures following, to wit:

JEFFERSON L. EDMONDS, and others,
vs. } 258.
ANDERSON CRENSHAW.

To the Honorable William Crawford, Judge of the District Court of the United States in and for the District of Alabama, exercising chancery jurisdiction:

Humbly complaining, sheweth unto your honor, your orator and oratrixes, Jefferson L. Edmonds, and Dorothy Ann, his wife, formerly Dorothy Ann Wadlington, Dorothy Wadlington, and the infants, Polly Brooks Wadlington and Sarah Susannah Frances Wadlington, who sue here by Dorothy Wadlington, their next friend and guardian, ad litem, all citizens of the State of South Carolina: that Aaron Cates, the father of your oratrix, Dorothy Wadlington, and the grandfather of the rest of your oratrixes, on the 7th day of February, in the year of our Lord one thousand eight hundred and sixteen, made his last will and testament, wherein and whereby he devised and bequeathed as follows, to wit:

"That all my estate, both real and personal, be sold at public auction, by my executors, hereafter named, on a credit of one, two and three years, the purchaser to give bond, with two good freehold securities, and a mortgage of the property, drawing interest from the time of the sale, except purchases, the amount of which does not exceed two hundred dollars, as to which my will is, that no more than

one year's credit be given; and except, also, purchases not exceeding five dollars, which must be paid at the sale.

In the second place, I will that my funeral expenses, and other necessary charges, and all just debts, be paid as soon as money enough for that purpose is collected.

I give and bequeath to my nephew, Aaron Cates, (son of Robert Cates,) all of my wearing apparel, and one hundred dollars in money, to be paid out of the money collected from the sale of my estate.

I give and bequeath to my cousin, Aaron Cates, (son of John Cates, Tennessee,) one hundred dollars, if alive; then to his eldest son; and if he has no son alive, then to his eldest daughter; to be paid out of the same funds, and in the same manner, as the preceding legacy.

Item.—I give and bequeath to Aaron Harrel one hundred dollars, to be paid in manner of the preceding legacies. It is my will that these three legacies draw interest from the expiration of one year after my decease, unless sooner paid.

In the third place, I will and bequeath that my executors (after paying the foregoing legacies, and all just debts and other proper charges and expenses,) receive, as a compensation for their services, ten per cent. on the whole amount of monies to be collected from the sale of my estate and outstanding debts which may be due me at the time of my decease, or which may become due thereafter.

After which, I will and direct that my executors vest the entire balance (including the nett proceeds of my estate then in their hands) in bank stock, or in shares or capital of such companies or corporations as in their judgments will be most proper and productive, in trust for the following benefits and uses, and subject to the following restrictions and regulations, viz:

To each of my three grand-daughters, to wit, Dorothy Ann Wadlington, Polly Brooks Wadlington, and Sarah Susannah Frances Wadlington, on their respectively attaining to the age of twenty-one years, I will that my executors pay one-fourth of the profits arising from the aforesaid stock, or shares; and should either die without issue living at her death, the provision herein made for her, to go her survivor or survivors; after they respectively attain to the age of twenty-one years, they are to receive the profits annually.

The remaining fourth part of said profits, I will to my daughter Dorothy, so long as she remains a widow; and on her death, or marriage, to my three grand-daughters, in manner as aforesaid. Should my said grand-daughters all die without having issue alive at their death, then I will that their parts, together with that of their mother, go to my next of kin. And it is my express intention that my daughter, or grand-daughters, shall not sell, or alien, the provision herein made for them, under the pain of forfeiting the same as if they were dead, but that they are merely to receive the profits annually.

And lastly, I constitute and appoint my friends, Anderson Crenshaw and James McMorris, executors of this my last will and testa-

ment, hereby revoking and repealing all other wills and testaments which I may have made; and on the death of either of my executors, it is my desire that his successor be sole executor, with power of appointing, either by deed or by will, a proper person to carry into effect the provisions and intentions of this my will and testament. I desire my grand-daughters to be reasonably educated by my executors out of the provisions above made for them." As will more fully appear by a true copy of said will contained in exhibit A, herewith filed, and which your orator and oratrixes pray may be taken as a part of this bill.

Your orator and oratrixes further represent unto your honor, that shortly after the execution of said will, the said Aaron Cates departed this life without altering or revoking the same, and leaving it in full force. That the said Anderson Crenshaw, at that time a citizen of the State of South Carolina, but a now a citizen of the State of Alabama, and the said James McMorris, the executors named in said will, caused the same to be proved in the ordinary's office for Newberry district, in the said State of South Carolina, and qualified and took upon themselves the burthen of the execution thereof. That they caused the personal property belonging to said estate to be inventoried and appraised, and on the eleventh day of March, 1816, on the credits directed in the said will, they sold the whole of the personal property belonging to said estate; which, agreeable to the sale-bill returned to the ordinary's office for Newberry district, in said State, (after being corrected in some particulars by the said executors,) amounted to the sum of twenty-five thousand one hundred and forty-four dollars three and a fourth cents, as will more fully appear, reference being had to a copy of the sale-bill contained in exhibit A, and which your orator and oratrixes pray may be taken as a part of this bill.

And your orator and oratrixes further show unto your honor, that the said Aaron Cates, at the time of his death, had on hand a considerable sum of money, and was possessed of, and entitled to, many debts due and owing to him, and which were either in accounts, or secured to be paid by notes, bonds, and mortgages: all of which came to the hands, power, or possession, of the said executors, and have by them been used, collected and received.

And your orator and oratrixes further show unto your honor, that Anderson Crenshaw, one of the executors named in the said will, some years since removed from the State of South Carolina to the State of Alabama, without vesting to be vested one cent of the funds in the hands of the said executors, belonging to the said estate, in stock of any kind, although your orator and oratrixes charge and believe that they might, at one time, have made advantageous investments. And your orator and oratrixes believe that the only reasons which prevented the executors from pursuing the directions of the will, were because they consulted their own interest in using or loaning out the money as they thought proper, and to avoid the per-

sonal inconvenience to themselves of an investment in stock, and an annual reception of the profits.

Your orator and oratrixes further state, that the said Anderson Crenshaw left the State of South Carolina and removed to the State of Alabama, without making to the tribunal, designated by law for that purpose, a showing of his administration and management of the said estate, and the property and funds belonging thereto.

And your orator and oratrixes further show, that they have frequently, and in a friendly manner, applied to the said executors, and requested them to pay and satisfy, unto your orator and oratrixes, their shares of said estate, and also to come to a fair and just account for, and in respect of, the effects of the said testator, which have been received by them; and to pay and apply such estate and effects, according to the directions of the said will, and agreeable to the intentions of the said testator, in and by his said will expressed. And your orator and oratrixes well hoped that such, their reasonable request, would have been complied with, as in justice and in equity they ought to have been, but in this hope they have been disappointed.

Your orator and oratrixes further state, that after the removal of the said Anderson Crenshaw from the State of South Carolina, the said James McMorris continued, for a time, the management of said estate. And your orator and oratrixes have been unable, although they have resorted to every means within their reach, to compel the said James McMorris to account for the said estate and the funds belonging thereto, except in part; that there is still in the hands of the said executors, to be accounted for, about sixteen thousand dollars of the funds of said estate.

Your orator and oratrixes further state, the said McMorris is entirely insolvent; all which actings and doings of the said Anderson Crenshaw and the said James McMorris are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator and oratrixes in the premises.

Your orator and oratrixes would further represent unto your honor, that, unless their case can be investigated and determined upon its merits in this honorable court, they will be entirely remediless in the premises, for the reason that they cannot sue in the circuit court of this State, because the said Anderson Crenshaw is judge of the circuit court of the county in which he resides, and cannot be sued out of the county of his freehold and residence.

In consideration whereof, and for as much as your orator and oratrixes are remediless in the premises, by the strict rules of the common law, and cannot have adequate relief except in a court of where matters of this kind are properly cognizable and relievable, may it please your honor to grant unto your orator and oratrixes a writ of subpœna, to be directed to the said Anderson Crenshaw and James McMorris, commanding them, under a certain penalty therein to be inserted, to be and appear before the honorable the district court of the United States, in and for the district of Alabama, at the

court to be holden for said district, at the city of Mobile, on the first Monday in May next, then and there, upon their respective and corporal oaths, according to the best and utmost of their knowledge, remembrance, information, and belief, full, true, direct and perfect answers make to all and singular the matters aforesaid, and that as fully as if the same were here repeated, and they particularly interrogated thereto; and more especially, that the said defendants may, in manner aforesaid, answer and set forth: whether the said testator did not make, and duly publish, his last will and testament in writing, of such date, and to such import and effect, as is before mentioned; and whether the said testator did not afterwards depart this life without altering or revoking the said will; and whether the said Anderson Crenshaw and James McMorris did not thereupon prove the said will in the ordinary's office of Newberry district, in South Carolina; and whether they did not take upon themselves the burthen of the execution thereof; and whether, by virtue thereof, they did not possess themselves of all the real and personal estate and effects of the said testator; whether they were not, to a considerable and what amount; and that the said Anderson Crenshaw and James McMorris may set forth and discover a full, true, and particular account of all and singular, the real and personal estate of the said testator at the time of his death; and whether the said inventory, referred to in exhibit A, does not contain a true statement of the same, and whether the said bill, referred to in exhibit A, is not a correct statement of the amount of sales of the property of said estate; and how the effects of said estate, and every part thereof, have been applied, disposed of, and administered; and to whom, and for what account, cause, or consideration. And that the said Anderson Crenshaw and James McMorris may be decreed, by this honorable court, to come to a fair and just account for, and in respect to, all and singular the real and personal estate and effects of the said testator, which have been received by them, or by any other person by their order, or which, without their wilful default, might have been received; and that the same may be vested in such way as this honorable court may direct, and thereout your orator and oratrixes may receive their proportions. And your orator and oratrixes request your honor to grant unto them such other and further relief as the nature of their case may require, and unto your honor shall seem meet; and, as in duty bound, they will ever pray.

A. B. BAYLEY, &
F. S. LYONS,
Solicitors for Complainants.

Filed in my office, March 22d, 1827.

J. ANSTILL, *Clerk.*

And afterwards, to wit, at a term of the district court of the United States, for the southern district of Alabama, begun and held in and for said district, at Mobile, on the first Monday of May, in the year of our Lord one thousand eight hundred and twenty-seven, before

his honor, William Crawford, judge of said court, the following proceedings were had, to wit:

Order.

This day came the parties, by their attorneys; and, on motion of counsel, it is ordered that this cause stand continued until the next regular term of this court.

And afterwards, to wit, at a term of the district court of the United States for the southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of December, in the year of our Lord one thousand eight hundred and twenty-seven, before his honor, William Crawford, judge of the said court, the following proceedings were had, to wit:

Order.—Order.

By consent of parties, by their attorneys, it is ordered that this suit be continued till the next term of this court; and that the rule to plead, answer, or demur, be extended to the first day of the next term of this court.

And afterwards, to wit, at a term of the district court of the United States for the southern district of Alabama, begun and held in and for said district, at Mobile, on the first Monday of May, in the year of our Lord one thousand eight hundred and twenty-eight, before his honor, William Crawford, judge of the said court, the following proceedings were had, to wit:

Order.—Order.

On motion of complainants, by their solicitors, it is considered by the court that this suit be continued till the next term of this court.

And afterwards, to wit, at a term of the district court of the United States for the southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of December, in the year of our Lord one thousand eight hundred and twenty-eight, before his honor, William Crawford, judge of said court, the following proceedings were had, to wit:

Order.

It is ordered by the court that this suit be continued till the next term of this court, and that the defendant have leave to plead, answer, or demur, on or before the next term of this court.

And afterwards, to wit, on the ninth day of April, in the year of our Lord one thousand eight hundred and twenty-nine, the defendant, Anderson Crenshaw, filed his answer to said bill of complaint, in the words and figures following, to wit:

Answer.

THE UNITED STATES OF AMERICA,
District Court of the United States
for the Southern District of Alabama:

The Answer of Anderson Crenshaw to the Bill of Complaint of Jefferson L. Edmonds, et al., against him and James McMorris.

This defendant, now, and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception to the manifest errors and insufficiencies in the complainants' said bill of complaint contained, for answer thereunto, or to so much thereof as this defendant is advised it is material to him to answer, he, answering, says: He admits that Aaron Cates made a will on the 17th day of February, 1816, and departed this life, in the State of South Carolina, shortly thereafter, leaving said will unrevoked, and that said will is correctly set forth in the bill of complaint; he also admits that he, this defendant, and the said James McMorris, proved the said will, and qualified as executors of the same, before the court of ordinary in Newberry district, in the State of South Carolina; he further admits that an inventory of said estate was taken, and the property belonging to the estate sold, as charged in the bill, but to what amount he does not recollect, though he admits the executors returned, to the ordinary's office aforesaid, a correct sale-bill, and true and perfect account of all the assets of said estate, including cash, evidences of debt, and mortgages, as well as of the sales of property sold by said executors. But this defendant would here observe, that property of considerable value, and sold by the executors as part of said estate, was afterwards recovered by other persons; and debts to a considerable amount, due from said estate, have been paid by the executors, the particulars of which, from lapse of time, cannot now be recollected by this defendant, but the benefit of which he insists on, should it hereafter become necessary. This defendant admits that he removed to the State of Alabama in the year 1819, and that previous to his removal he did not, nor did said McMorris, invest said estate, as directed by the will, because the moneys of said estate were not collected to an amount sufficiently large, previously to this defendant's resignation of said trust, as hereinafter mentioned; and because Mrs. Wadlington, one of the legatees, and only daughter of the testator, and who was the natural guardian of her then infant children, and who were principal legatees, opposed such investment by every means in her power.

This defendant, further answering, saith, that on the day of , 1819, and previously to his removal from South Carolina, he surrendered up and delivered over to McMorris, his said co-executor, all

the assets of said estate which had ever come to his hands, including cash, evidences of debt, and other liabilities, and took from said McMorris a receipt, a copy of which is hereto attached, marked A, and which is prayed to be taken as a part of this answer, with leave to refer to the original in his possession as often as necessary; the precise amount and particulars of which cash and assets, at this distant period of time, he is unable to recollect, but the benefit of which he insists on, should it hereafter become necessary.

He, further answering, saith, that during the time this defendant continued in the administration of said estate, both he and his co-executor made correct returns, annually, as required by law, to the court of ordinary of said district; and that when this defendant settled last with said McMorris, and took said receipt, he retained the same, and filed a copy thereof with the said court of ordinary, as his last return and final settlement of said estate; and from that time since, this defendant has not resided in South Carolina, and has not, in any manner, intermeddled with said estate.

This defendant, further answering, saith, that previously to, and at the time of, the said settlement and delivery of said estate by this defendant to McMorris, he, the said McMorris, was, in the opinion of this defendant, as faithful and competent to settle and conduct the administration of the same, as he was when appointed executor; and if said McMorris has committed any devastation, as charged in the bill, (of the truth of which this defendant is ignorant,) it has been without the knowledge, privity, or consent, of this defendant. This defendant has been informed, and he believes, that McMorris has paid over into the court of equity, under its decree in South Carolina, for the use and benefit of complainants, as assets of said estate, upwards of twenty-one thousand dollars, or thereabouts. Having had no intercourse with McMorris since his removal from South Carolina, defendant knows not how much is yet due of said estate from McMorris to the complainants, nor of his ability to pay This defendent denies all fraud and combination, and prays to be here dismissed with his reasonable costs.

And this defendant, for further answer, says, that the whole amount of said estate by him received and collected, according to the best of his recollection and belief, was the sum of dollars, which he paid over to, and settled with, the said McMorris, and which was embraced in said receipt.

HITCHCOCK & HALL,
Defendant's Solicitors.

Agreement.

We agree, at the first term (or any subsequent term, should the case not be heard at the first term) to go to trial on bill and answer; and it is further agreed, that the receipt, referred to in said answer, given by McMorris to Crenshaw, shall be considered as duly proved,

and have its full force and effect, as if the same had been regularly proved.

A. CRENSHAW.
BAGLY & LYON,
For Complainants.

Answer of defendant filed 9th April, 1829.
J. ANSTILL, *Clerk.*

And afterwards, to wit, at a term of the district court of the United States for the southern district of Alabama, begun and held in and for said district, at Mobile, on the first Monday of May, in the year of our Lord one thousand eight hundred and twenty-nine, before his honor, William Crawford, judge of the said court, the following proceedings were had, to wit:

Order.—Order.

This cause is continued by order of the court.

And afterwards, to wit, at a term of the district court of the United States for the southern district of Alabama, begun and held in and for said district, at Mobile, on the second Monday of December, in the year of our Lord one thousand eight hundred and twenty-nine, before his honor, William Crawford, judge of the said court, the following proceedings were had, to wit:

Judgment.

This cause having this day been brought on to be heard upon bill and answer, and argument having been thereupon heard by the court, and mature deliberation being thereupon had, it seems to the court now here, that the allegations of said complainants, as set forth in the bill of the said complainants, are fully and sufficiently, and barred by the answer of the said defendant. It is therefore ordered, adjudged, and decreed, that the complainants take nothing by their bill; that the same be dismissed; that the defendant go hence, without a day, and recover from the complainants his costs, in and about the defence to the said bill in this behalf expended; and that execution may issue for the same.

And afterwards, to wit, on the thirteenth day of August, in the year of our Lord one thousand eight hundred and thirty-six, the said Jefferson L. Edmonds and Dorothy Ann, his wife, Dorothy Wadlington, and the infants, Polly B. Wadlington and Sarah S. F. Wadlington, filed, in the clerk's office of said district court, their appeal to the Supreme Court of the United States, in the words and figures following, to wit:

Appeal.—Appeal.

DISTRICT COURT OF THE UNITED STATES,
for the Southern District of Alabama.

In chancery, between Jefferson L. Edmonds and Dorothy Ann, his wife, Dorothy Wadlington, and the infants, Polly B. Wadlington and Sarah S. F. Wadlington, who sued by Dorothy Wadlington, their next friend and guardian ad litem, *vs.* Anderson Crenshaw.

The complainants, Jefferson L. Edmonds and Dorothy Ann, his wife, Robert H. Spencer and Sarah, his wife, lately Sarah S. F. Wadlington, and who hath intermarried with the said Robert H., Minor W. Gracy and Mary, his wife, lately Mary B. Wadlington, hereby state to this honorable court, that they appeal—and they hereby do appeal to the honorable the Supreme Court of the United States, from the decree rendered in this court at the December term, 1829, in the above entitled cause, whereby it was ordered, adjudged, and decreed that the bill of the complainants should be dismissed, and that the complainants should pay the costs of suit in said cause, and that defendant should go hence without day. And the appellants show to your Honors, that Dorothy R. Wadlington hath departed this life, since the rendition of said decree; that Minor W. Gracy hath, since the rendition of said decree, intermarried with Mary B. Wadlington; and that Robert H. Spencer hath, since the rendition of said decree, intermarried with Sarah S. F. Wadlington; and that the said Sarah S. F. and Mary B. (otherwise called Polly B.) were infants at the time of the rendering of said decree; and that this appeal is prayed within five years after the said Sarah S. F., now wife of Robert H. Spencer, hath obtained the age of twenty-one years. And the said appellants say, that they are the persons now interested in the said cause, and injured by said decree; that the same is, as they are advised, erroneous. Wherefore they pray, that the said decree and proceedings may be sent and certified to the said Supreme Court of the United States at the next term thereof; that the said errors may be corrected, and a proper decree may be rendered in this behalf. Dated this thirteenth day of August, in the year 1836.

STEWART & THORNTON,
Solicitors for Comp'ts and Appel'ts.

To the Hon. the JUDGE
of the District Court of the U. S.
Southern District of Alabama.

Appeal filed 13th August, 1836.
(Attest) DAVID FILES, *Clerk.*

Exhibit A—(filed with the Bill of Complaint.)

THE STATE OF SOUTH CAROLINA, *Newberry District:*

Be it known, that I, Aaron Cates, of the district and State aforesaid, being weak in body, but of sound and disposing mind and memory, do make, ordain, and publish this my last will and testament, to wit: In the first place, that all my estate, both real and personal, be sold, at public auction, by my executors hereafter named, on a credit of one, two and three years; the purchaser to give bond, with two good freehold securities, and a mortgage of the property, drawing interest from the time of sale—except purchases, the amount of which does not exceed two hundred dollars, as to which my will is, that no more than one years' credit be given; and except, also, purchases not exceeding five dollars, which must be paid at the sale. In the second place, I will that my funeral expenses, other necessary charges, and all just debts, be paid, as soon as money enough for that purpose is collected. I give and bequeath to my nephew, Aaron Cates, (son of Robert Cates,) all my wearing apparel, and one hundred dollars in money—to be paid out of the money collected from the sale of my estate. Item, I give and bequeath to my cousin, Aaron Cates, (son of John Cates, Tennessee,) one hundred dollars, if alive; if dead, then to his eldest son; and if he have no son alive, then to his eldest daughter—to be paid out of the same funds, and in the same manner as the preceding legacy. Item, I give and bequeath to Aaron Harrel, one hundred dollars—to be paid in manner as the preceding legacies. It is my will, that these three legacies draw interest, from the expiration of one year after my decease, unless sooner paid. In the third place, I will and direct that my executors, after paying the foregoing legacies, and all just debts, and other proper charges and expenses, receive, as a compensation for their services, 10 per cent. on the whole amount of moneys to be collected from the sale of my estate, and of outstanding debts which may be due me at my decease, or which may become due thereafter. After which, I will and direct, that my executors vest the entire clear balance (including the nett proceeds of my estate then in their hands) in bank stock, or in the shares or capital of such companies or corporations, as, in their judgment, will be most proper and productive, in trust for the following benefits and uses, and subject to the following restrictions and regulations, viz: to each of my three grand-daughters, to wit, Dorothy Ann Wadlington, Polly Brooks Wadlington and Sarah Susannah Frances Wadlington, on their respectively attaining to the age of twenty-one years, I will, that my executors pay one-fourth of the profits arising from the aforesaid stock or shares; and should either die without issue living at her death, the provision herein made for her to go to her survivor or survivors; after they respectively attain the age of twenty-one

years, they are to receive the profits annually. The remaining fourth part of the said profits I will to my daughter, Dorothy, so long as she remains a widow; and at her death or marriage, to my three grand-daughters in manner as aforesaid. Should my said grand-daughters all die without leaving issue alive at their death, then I will, that their parts, together with that of their mother, go to my next of kin; and it is my express intention, that my daughter or grand-daughters shall not sell or alien the provision herein for them made, under the pain of forfeiting the same as if they were dead, but that they are merely to receive the profits annually. And lastly, I constitute and appoint my friends, Anderson Crenshaw and James McMorris, executors of this my last will and testament, hereby revoking and repealing all other wills and testaments which I may have made. And on the death of either of my executors, it is my desire, that his survivor be sole executor, with power of appointing, either by deed or by will, a proper person to carry into effect the provisions and intentions of this my will and testament. I desire my grand-daughters to be reasonably educated, by my executors, out of the provisions above made for them.

A. CATES. (SEAL.)

Signed, sealed, and published in presence of us, the undersigned witnesses, this 7th day of February, 1816.

BENJAMIN S. OGLETREE,
ROBERT CHANDLER, his ⋈ mark,
THOMAS CATES.

SOUTH CAROLINA, *Newberry District:*

At a court of ordinary, begun and held in and for the district aforesaid, the 15th day of February, in the year of our Lord one thousand eight hundred and sixteen, the within last will and testament of Aaron Cates, deceased, was duly proved, by the oath of Robert Chandler, one of the subscribing witnesses to the same; having been first approved and allowed of, and was ordered to be recorded. Anderson Crenshaw and James McMorris, executors named in the said last will and testament, came into court, and was duly qualified, as the law directs, and obtained letters testamentary.

(Attest) JAMES FARNAUDS, *O. N. D.*

Appraisement of the Estate of Aaron Cates, deceased.

5 wheels and 4 pair cards - - - -	$10 00
A lot of plough hoes and rods - - - -	6 00
6 single trees and 3 clevises - - - -	1 50
2 bars of iron, at 7 cts. per pound.	
Lot of scythes and cradles - - - -	1 50
Lot of axes, wedges, spade, and drawing-knife - -	12 62½

2 mattocks	$4 25
A lot of gear	5 50
A lot of tobacco, at 7 cts. per pound.	
Steelyards and augers	2 00
Crow, old iron and nails	18
A lot of old irons	3 50
A lot of books and other articles	4 00
Cupboard and contents	6 50
Tables	3 00
7 chairs	1 00
1 waggon and hind gear	30 00
1 raw hide	2 00
1 pewter basin, keg, and piggin	1 25
Pork in the pickle, at $500 per cwt.	
Lard, at 12½ cts. per pound.	
Salt	1 00
A lot of castings	4 00
Old Milly.	
Archy	375 00
Hall	550 00
Lucy and child	500 00
Stephen	400 00
Sarah	350 00
Ely	250 00
Eddy	200 00
Mary	150 00
Milly and Austin	550 00
Charlotte and March	525 00
Jim	400 00
Young	362 50
Will	275 00
Betsey	225 00
Bob	600 00
Gelding Doctor	80 00
Republican Filly	20 00
Medley colt	35 00
1 bed and furniture	25 00
1 bed and furniture	15 00
2 other beds	25 00
A parcel of inferior cotton, $3 50 per cwt.	
2 ladles	19
A parcel of good cotton, at $5 00 per cwt.	
A lot of flax and shoe thread	1 00
1 chamber pot, weaving harness, and bagging	1 75
1 pr. saddle-bag and leather	3 00
1 lot clean cotton, 20 cts. per pound.	
1 chest	2 00
Spools and spun cotton	25
1 lot weeding hoes	1 50

3 barrels and a keg	$3 00
Corn, at $2 50 per barrel.	
The wood-work of a waggon	25 00
Sam (Stallis)	600 00
Henry and child	550 00
Doley	350 00
George	475 00
Bill	300 00
Sam (Bugg)	600 00
Old Ben	200 00
Clara and Adam	400 00
Ben	475 00
Nancy	300 00
Sealy	300 00
Isham	250 00
Elisha	175 00
Fillis	400 00
1 Sorrel Gelding	40 00
Bedford mare	35 00
Tennessee mare	55 00
Gray mare (Snipt)	75 00
1 lot of plank, at $1 per six foot.	
1 stallion medley	150 00
1 case of bottles	3 00
1 jug, logwood and other old lumber	1 00
18 head of cattle	88 50
91 head of hogs at home	129 50
1 still, 12 stands, and 1 fill-cask	72 00
6 head of sheep	9 00
10 empty barrels in the mill	2 50
1 screan, wheat sieve, and half bushel	3 00
Charles	300 00
Jack	400 00
1 mare Floriday	80 00
Nockumstiff	40 00
Virgin mare	45 00
Rye, at 75 cts. per bushel.	
1 lot of walnut plank, at $2 per 6 foot.	
1 lot of machine scantling	8 00
1 lot of laths and paling	3 50
1 lot scantling	2 00
Shingles, at $3 per thousand.	
Fodder, at the ferry, at 50 cts. per cwt.	
37 hogs at the ferry	62 50
Fodder in the barn	17 00
Crowbar, sledge, and picks	2 00
Fodder at the upper place, 50 cts. per cwt.	

We certify that, in pursuance of a warrant of appraisement to us directed, we did, on the 1st day of March, 1816, being first duly sworn according to law, appraise all the personal estate of Aaron Cates, deceased, shown to us by the exors., and that the foregoing is a true appraisement of the same. Sworn to before me this day of March, 1816.

BENJAMIN S. OGLETREE,
JOHN CLARK,
JOHN CALDWELL,
BENJ. MAYBIN.

Sale Bill of the Estate of Aaron Cates, deceased, commencing on the 11th March, 1816.

David Lavender, 1 wheel	$0 50
Thomas Davis, 1 do	1 12½
James Johnston, 1 do	1 06¼
William Stacks, 1 do	1 75
Benj. Ogletree, 1 do	1 56¼
David Lavender, 1 cythe and cradle	50
Jacob Luber, 1 do	12½
John Gilliam, 4 pr. cards	37½
David Lavender, lot of plates and rods	2 06¼
Samuel Hall, lot of old iron, &c.	50
John Gilliam, 3 halter chains	1 37½
Jacob Luber, lot old irons, &c.	1 50
George Luber, lot chisels, &c.	1 75
Thomas Owen, lot old books	25
James Wadlington, 1 gazetteer	2 00
David Lavender, cupboard furniture	7 75
Robert Chandler, 3 tables	3 50
William Kelly, 7 chairs	1 06¼
John Gilliam, singletree and clevises	56¼
James McMorris, iron pt. pr lb. 6¼ cts., 50 lbs.	3 12½
Herbert Tucker, broad-axe	2 00
John Ramage, drawing-knife	75
James McMorris, lot 3 axes	3 00
Thomas Banskett, do. 3 do.	2 56¼
Do. do. 1 small axe	25
George Henry, 2 mattocks	1 06¼
William Lavender, 1 mattock	1 00
James Blair, spade, chains, &c.	1 50
Burwell Chick, chains, haimes, &c.	5 56¼
James McMorris, tobacco, 5 pr. lb., 60 lbs.	3 00
Mathew Hutchinson, 2 augers	56¼
George Feltman, 1 pr. steelyards	1 12½
Joseph Leach, 6 hoes	50
John Adams, 2 iron wedges	1 31¼
John Crooks, 1 auger	50

Daniel Coleman, 1 cask		$0 50
Do do 3 do		2 50
Mathew Hutchinson, wood-work wagon		32 00
George Luber, wagon		33 00
Joseph Leach, cowhide		1 12½
James McMorris, lot pork at 5 56¼ pr hund. 344 lbs.		19 41
Robert Cates, do do 4 50 " 257		11 56
John Adams, do do 4 06¼ " 443		17 99
John Parrott, do do 3 31¼ " 474		15 69
Dr. R. Huston, do do 2 25 " 203		4 56
James McMorris, 1 keg fat, 15½ " 60		9 30
Dr. R. Huston, do 15½ " 90		13 80
James Hill, salt and *bale*		18
George Godfrey, lot of pots		3 81¼
James Wadlington, Charlotte and child Storke		643 00
James McMorris, Toney		477 00
James Wadlington, Will		361 00
Do do Betsey		270 00
William Rutherford, Hala		751 00
Arthur Park, Anaka		320 00
William Malone, Lucy and 2 children		791 00
James Teague, Stephen Shell		501 00
James McMorris, Sarah		415 00
Elisha Hammond, Eli		265 00
Do do Ede		226 00
Andrew Summer, Jim		642 00
William Garey, sorrel horse		47 00
Edward Johnston, bay mare		102 00
Joseph Smith, bay horse		62 50
Mathew Hutchinson, chesnut sorrel mare		81 50
Tarleton Murphy, bright sorrel mare		90 00
James Kelly, jun'r, bay mare		49 50
Mathew Hutchinson, grey mare		93 00
Solomon Style, chesnut sorrel horse		98 50
Josiah Williamson, iron-grey colt		28 00
Simon Carey, sorrel colt		70 00
Ephraim Luber, grey stallion		127 00
David Glun, black and white cow and calf		13 75
Edmond Kelly, do do		13 00
William Johnston, no-horned cow and calf		11 75
James Gallagher, dun and white cow and calf		13 25
John Adams, black cow and calf		11 25
Josiah Leach, black steer		9 25
Do do black and white and red		8 50
William Mar, red cow,		8 00
George Kelly, lot hogs, No. 1		23 00
George Adams, do 2		26 50
Henry Swingler, do 3		16 25
George Summers, do 5		19 12

Jesse Wadlington, lot hogs, No. 4	$14 00
William Kelly, do 6	21 18¾
Thomas Speak, coffee mill	1 25
F. F. Calmes, stone jug	75
John Clark, blankets	2 98¾
Jesse Wadlington, 130 acres, more or less, $7 51	976 30
Dr. Calmes, 315 do do 6 25	1,968 75
Dorothy Wadlington, cutting-knife and box	56¼
Jesse Wadlington, 250 acres, more or less, $1 56¼	390 62½
John McMorris, 340 do do 6 00	2,040 00
Jesse Wadlington, stills and vessels	79 41
James Kelly, Sen., 6 head sheep	12 06¼
Jesse Wadlington, shingles, &c.	12 00
James McMorris, 40 hogs (over river)	75 00
Thomas Bunskett, 1 chest	2 25
Thomas Kelly, old irons	1 18¾
Robert Cates, 70½ lbs. iron, at 6½ per lb.	4 58
Dorothy Wadlington, negro George	750 00
Robert Chandler, bed and furniture	13 00
James Kelly, bed and furniture	16 06¼
Do do do	18 25
Thos. Owens, sen'r, lot cotton, at 4½ cts. pr lb., 1,510 lbs.	67 95
Langston Gord, do do at 5¼ pr lb., 5,617 lbs.	294 99
Robert Chandler, 1 saddle	19 00
James Clay, 1 saddle	1 50
Thomas Davis, 1 lot sundries	56¼
John Adams, 1 lot sundries	62½
Robert Cates, 1 pair saddlebags	1 56¼
Scott Chandler, leather, &c.	1 00
Do do spools, &c.	62½
George Cromes, 6 hoes	$1 ¼
Josiah Leach, 3 yearlings, 2 white and red one each	9 00
Do do 3 do black, red, and white and red	8 50
Dorothy Wadlington, Milly and child	801 00
C. B. Atwood, Bob	790 00
Isaac Jones, Hanna and child	706 00
Mathew Hutchinson, Dolly	429 00
James Farnands, Sam (Suttler)	871 00
John Boyd, Phillis	602 00
William Shelton, Sam (Bugg)	713 00
William Rutherford, Ben (boy)	704 00
Asa Cates, Billy	560 00
Reuben Gilliam, Ben, Clara and child	911 00
Jesse Maybin, Jack	915 00
Herbert Tucker, Charles	740 00
James Wood, (Eng.) Nancy	540 00
Bird Willingham, Celia	451 00
Thomas Starke, Isam	306 00
Do do Elijah	225 00

Thomas Banskett, 1 case bottles				$5 00
W. B. Buckhanan,	31¼ bush. corn,	76,		23 75
Dr. Richard Huston,	50 "	76		38 00
Do do	50 "	75		37 50
William Haupton,	50 "	66		33 00
Dr. R. Huston,	50 "	70		35 00
Jesse Wadlington,	100 "	70		70 00
Ben. Mabin,	51 "	71		35 50
Herbert Tucker,	50 "	70		35 00
William Haupton,	7½ "	71		5 30½
John Adams,	50 "	69		34 50
Do do	50 "	65		32 50
George Summer,	50 "	64		32 00
Marcus Littleton,	50 "	64		32 00
Jesse Wadlington,	47 "	64		30 08
James Hill,	39½ "	64		25 28
Elisha Hammond,	23½ "	63½		14 92
F. F. Calmes, sledge, pick, and crowbar				2 50
John Adams, doubletrees				1 56¼
B. S. Ogletree, 2,885 lbs. fodder, a 70 pr hund.				20 19½
E. Summers, 900 lbs. fodder, a 88				7 92
B. Johnson, 450 lbs. " 95				4 27½
James McMorris, walnut plank, 131 pr cwt.				1 96
Dr. B. Chick, feet scantling, at $1 pr cwt.				
William Turpin, strouding				2 00
Do do laths and paling				2 00
John Segre Cates, square				75
John McMorris, sifter				1 62½
William Buckhanan, 3 bush. rye, a $1 03				3 09
R. Huston, hand-saw				1 56¼
				$24,397 78¼

Returned by Crenshaw and McMorris, Executors.

Add gain on lands, bought by Calmes and Wadlington	514 96¾
	$24,912 75

Errors in the Sale-bill rectified.

When the corn, after the sale, was delivered to the purchasers, who at the sale gave their notes or bonds for the full amount sold, there was a deficiency as follows, viz:

William Buchanan got only 31¼ bushels, in all.
William Haupton got only 57½ bushels, in all.
Jesse Wadlington got only 147 bushels, in all.
B. Maybin got only 46 bushels, in all.

James Hill got only 39¼ bushels, in all.
E. Hammond got only 23½ bushels, in all.
Calmes got only 36 hogs, in all.
John Mars got no corn; and Samuel Shelton got none.

The land purchased by Calmes, which was surveyed after the sale, amounted to $2,218 75.

The land purchased by McMorris was afterward sold, under decree in equity, for $4,328 25; which sum was ordered to be divided between Cates's estate and Dililah Perry, a lunatic, who, it seems, was entitled to one-half—$2,169 12½.

The land purchased by Wadlington was surveyed after the sale, and amounted to $1,631 89¼.

A Return of the Executors of the Estate of Aaron Cates, deceased, to the Ordinary, for the year 1816, per James McMorrison, one of the Executors.

Received.

Cash on hand	$162 81
" of B. S. Ogletree	20 00
" of George Clark	1 33
" of M. Blair	1 50
" of R. Maybin	50
" of William Calines	500 00
" Do do	127 00
	$813 14

Expended.

Paid A. Cates, for hunting stray horse	$7 50
Coffee and sugar for overseer	4 00
Do do and flour, for negroes	6 50
Spirits for sale	8 25
Taxes on the estate	46 99
Johnston, overseer	29 00
James R. Wood, on note	182 62½
6 months schooling D. A. Wadlington, and board	24 00
Do in Columbia*	35 00
Do books, &c.	28 00
Do cash to her	15 00
John Durham	20 00
William Littleton	13 75
William Pinchback	20 00
Thomas Cates	19 50
	$460 11½

* Nineteen dollars allowed on this item.

I do certify, that the above is a just and true account of the receipts and expenditures on the estate of Aaron Cates, deceased, for the year 1816.

JAMES McMORRIS.

Per Anderson Crenshaw, for the same year—1816.

Received at Sale.

Of Daniel Lavender	$0 50
Thomas Davis	1 12½
James Johnston	1 06¼
William Starks	1 75
David Lavender	50
Jacob Luber	12½
John Gilliam	37½
David Lavender	2 06¼
John Gilliam	56¼
George Henry	1 06¼
William Lavender	1 00
B. Chick	3 56¼
George Tillman	1 12½
John Gilliam	1 37½
Jacob Luber	1 50
Thomas Owen	25
David Lavender	7 75
W. Kelly	1 06¼
David Lavender	7 25
Do do	8 00
James Clay	1 50
Thomas Davis	56¼
Scott Chandler	1 62½
George Cromer	1 81¼
John Crooks	50
Daniel Coleman	3 00
George Godfrey	3 81¼
Simon Carey	10 00
William Johnston	11 75
William Mars	8 00
F. F. Calmes	2 00
William Turpin	4 00
F. F. Calmes	75
20th November, 1816, of James Wood, on his bond	217 80
	*$288 61¼

* True amount is $308 61¼.

James Hill got only 39¼ bushels, in all.
E. Hammond got only 23½ bushels, in all.
Calmes got only 36 hogs, in all.
John Mars got no corn; and Samuel Shelton got none.

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A Return of the Executors of the Estate of Aaron Cates, deceased, to the Ordinary, for the year 1816, per James McMorrison, one of the Executors.

Received.

Cash on hand	$162 81
" of B. S. Ogletree	20 00
" of George Clark	1 33
" of M. Blair	1 50
" of R. Maybin	50
" of William Calines	500 00
" Do do	127 00
	$813 14

Expended.

Paid A. Cates, for hunting stray horse	$7 50
Coffee and sugar for overseer	4 00
Do do and flour, for negroes	6 50
Spirits for sale	8 25
Taxes on the estate	46 99
Johnston, overseer	29 00
James R. Wood, on note	182 62½
6 months schooling D. A. Wadlington, and board	24 00
Do in Columbia*	35 00
Do books, &c.	28 00
Do cash to her	15 00
John Durham	20 00
William Littleton	13 75
William Pinchback	20 00
Thomas Cates	19 50
	$460 11½

* Nineteen dollars allowed on this item.

I do certify, that the above is a just and true account of the receipts and expenditures on the estate of Aaron Cates, deceased, for the year 1816.

JAMES McMORRIS.

Per Anderson Crenshaw, for the same year—1816.

Received at Sale.

Of Daniel Lavender	$0 50
Thomas Davis	1 12½
James Johnston	1 06¼
William Starks	1 75
David Lavender	50
Jacob Luber	12½
John Gilliam	37½
David Lavender	2 06¼
John Gilliam	56¼
George Henry	1 06¼
William Lavender	1 00
B. Chick	3 56¼
George Tillman	1 12½
John Gilliam	1 37½
Jacob Luber	1 50
Thomas Owen	25
David Lavender	7 75
W. Kelly	1 06¼
David Lavender	7 25
Do do	8 00
James Clay	1 50
Thomas Davis	56¼
Scott Chandler	1 62½
George Cromer	1 81¼
John Crooks	50
Daniel Coleman	3 00
George Godfrey	3 81¼
Simon Carey	10 00
William Johnston	11 75
William Mars	8 00
F. F. Calmes	2 00
William Turpin	4 00
F. F. Calmes	75
20th November, 1816, of James Wood, on his bond	217 80
	*$288 61¼

* True amount is $308 61¼.

Expended, the same year.

Paid to John Ramage, for crying sale three days -	$6 00
M. Coate, for surveying (and three plates) four days	15 00
John S. Coate, on per account - - -	2 00
Allen Cates, on do - - -	9 50
John Dusham, balance of account - - -	82 75
Do for probate - - -	31¼
	$115 56¼

I certify, the foregoing to be a true copy of the receipts and expenditures, by me, on the estate of Aaron Cates, deceased, for the year 1816, to the best of my knowledge and belief.

A. CRENSHAW.

A Return on the estate of Aaron Cates, deceased, by James McMorris, one of his executors, for the year 1817.

1817.	April 15, received of Joseph Leach - -	$17 00
	Mar. 14, received of Reuben Gilliam, - -	367 43
	April 20, received of James Kelly - -	19 00
	" " received of Jesse Wadlington - -	100 00
	May 1, received of Jesse Maybin - -	364 05
	Nov. 18, received of Mat. Hutchinson - -	200 00
		$1,067 48

I certify, the above to be a just and true account of the above estate, for 1817, to the best of my knowledge.

JAMES McMORRIS.

Expenditures.

1817.	Paid A. Cates, Jun'r, his account - -	$40 12½
	Do. do. his legacy - - -	100 00
	Do. Mrs. Perry on note - - -	33 25
	Do. overseer, B. Johnston - - -	8 00
	Do. Morgan & Gairy, for Dorothy Ann -	22 37½
	Gave do. - -	15 00
	Paid Lewis Desher - - - -	2 00
	Do. Mrs. B. note for board of Dorothy Ann -	20 37½
	Do. Mr. Thompson for schooling do. -	10 83
	Do. John McMorris - - - -	5 12½
	Do. Tanes - - - - -	1 72
	Do. J. Caldwell, 2 notes - - -	12 82
	Do. tomb-stone - - - -	29 49

Paid Dr. Glenn - - - -	$4 00
Do. Dr. Phillips - - - -	51 50
Do. B. Chandler, for attendance in last sickness of testator - - - -	47 50
	$404 61

A Return on the Estate of Aaron Cates, dec'd, by Anderson Crenshaw, one of his Executors for the year 1817.

Receipts.

1817. Jan. 13.	Rec'd of Allen Cates, on his bond -	$39 20
Feb. 20.	Rec'd of Thomas Storke, do. -	370 00
March 3.	Rec'd of Bird Willingham, do. -	31 57
" 12.	Rec'd of John Parrott, on his note -	16 90
" 15.	Rec'd of Sol. Sleigh, on his note -	105 43
Jan'y 5.	Rec'd of Wm. Calmes, on his bond -	620 00

I, David Files, clerk of the circuit court of the United States for the ninth judicial circuit and southern district of Alabama, do hereby certify that the beforegoing twenty pages contain a full, true and perfect exemplification of the record and proceedings in a certain cause lately determined in said court, wherein Jefferson L. Edmonds, wife, and others, were complainants, and Anderson Crenshaw and James McMorris were defendants.

In witness whereof, at office, in the city of Mobile, I have hereunto set my hand, and affixed the seal of said circuit court, this (SEAL.) fourth day of January, in the year of our Lord one thousand eight hundred and thirty-nine.

DAVID FILES,
Clerk So. Dist. Ala.

735.

SUPREME COURT OF THE UNITED STATES.

No. 75.

SUSAN DECATUR, PLAINTIFF IN ERROR,

vs.

JAMES K. PAULDING, SECRETARY OF THE NAVY.

IN ERROR TO THE CIRCUIT COURT U S. FOR WASHINGTON.

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Langtree & O'Sullivan, Print.—1840.

UNITED STATES OF AMERICA, sct.

The President of the United States to the judges of the circuit court of the District of Columbia, in the county of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, between Susan Decatur, on petition for a mandamus against James K. Paulding, Secretary of the Navy, a manifest error hath happened to the great damage of the said Susan, as by her complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the Monday of next, in said Supreme Court, then and there had and held; and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the laws and the custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief judge of said Supreme Court.

Issued the 16th day of January, 1840.

WM. BRENT, Clerk.

DISTRICT OF COLUMBIA, to wit:

The United States of America to the Hon. James K. Paulding, Secretary of the Navy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the District of Columbia, in the county of Washington, wherein Susan Decatur is complainant and you are defendant, to show cause, if any there be, why the judgment rendered against the said Susan Decatur should not be corrected, and why speedy justice should not be done to the parties aforesaid in this behalf.

Witness the Hon. Wm Cranch, chief judge of the said circuit court, this 16th day of January, 1840.

WM. BRENT, Clk.

Service acknowledged.

F. S. KEY, U.S. Att'y, D.C.

Appeal Bond.—*Appeal Bond.*

Know all men by these presents, that we, Susan Decatur, William L. Brent, and , are held and firmly bound unto James K. Paulding in the full and just sum of two hundred dollars, current money, to be paid to the said James K. Paulding, his certain attorney, executors, or administrators, to which payment, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents; sealed with our seals, and dated this 16th day of January, 1840.

Whereas, lately at a circuit court of the District of Columbia, sitting for the county of Washington, in a suit pending in the said court, wherein the United States, on the relation of the said Susan Decatur, was plaintiff, and the said James K. Paulding, Secretary of the Navy of the United States, was defendant, judgment was rendered against the said plaintiff, and she having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation to the said James K. Paulding, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the Monday of next.

Now the condition of the above obligation is such, that if the said Susan Decatur shall prosecute her said writ to effect, and answer all damages and costs if she fails to make her plea good, then the above obligation to be null and void, otherwise to be and remain in full force and virtue in law.

SUSAN DECATUR, [SEAL.]
W. L. BRENT, [SEAL.]

Signed, sealed and delivered in the presence of

Style of Court.

DISTRICT OF COLUMBIA, *ss.*

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the fourth Monday of November, being the twenty-fifth day of the same month, in the year of our Lord one thousand eight hundred and thirty-nine, and of the Independence of the United States the sixty-fourth.

Present: The Honorable WILLIAM CRANCH,
Chief Judge.
BUCKNER THRUSTON, and
JAMES S. MORSELL,
Assistant Judges.
ALEXANDER HUNTER, Esq., Marshal.
WILLIAM BRENT, Clerk.

In the record of the proceedings of the said court, among others, are the following, to wit:

Parties.

UNITED STATES, on the relation of SUSAN DECATUR,
against
JAMES K. PAULDING, Secretary of the Navy of the United States.

Be it remembered, that at the present term of the said circuit court, the said relator, by Richard S. Coxe, and William L. Brent, Esquires, her solicitors, filed in court here the following petition, to wit:

Petition.

To the honorable the judges of the circuit court of the District of Columbia for the county of Washington:

The petition of Susan Decatur, widow of the late Stephen Decatur, who was a commodore in the naval service of the United States, respectfully sheweth: That the Congress of the United States passed a resolution which was approved by the President of the United States, upon the 3d day of March, 1837, in favor of your petitioner: That in and by said resolution, ii was provided and resolved, "That Mrs. Susan Decatur, (who is your petitioner,) widow of the late Commodore Stephen Decatur, be paid from the navy pension fund, a pension for five years, commencing from the thirtieth of June, eighteen hundred and thirty-four, in conformity with the provisions of the act concerning naval pensions and the naval pension funds, passed the thirtieth of June, eighteen hundred and thirty-four, and that she be allowed from said fund the arrearages of the half pay of a post captain, from the death of Commodore Decatur to the thirtieth of June, eighteen hundred and thirty-four, together with the pension hereby allowed her; and that the arrearage of said pension be vested in the Secretary of the Treasury in trust for the use of the said Susan Decatur, (your petitioner,) provided that said pension shall cease on the death or marriage of said Susan Decatur, (your petitioner,) and your petitioner avers that she is still single and unmarried.

Your petitioner further showeth unto your honors, that by an act of the Congress of the United States, approved by the President of the United States, upon the 10th day of July, 1832, the Secretary of the Navy of the United States is constituted the trustee of the naval pension fund, and as such, it is made his duty to grant and pay the pensions, according to the terms of the acts of Congress in such cases made and provided; all of which is shewn to your honors by a reference to the said resolution marked A, hereunto annexed, and to the said act of Congress of the 10th July, 1832.

And your petitioner further showeth unto your honors, that she made application to the Honorable James K. Paulding, the Secretary of the Navy of the United States, to grant her the said pension allowed her by

the resolution of Congress aforesaid, and the arrearages of half pay, in manner and form as granted and directed in and by said resolution, and that he has, and still does refuse, omit and neglect, notwithstanding the positive provisions of the aforesaid resolution of Congress, and the vested right of your petitioner under the same, to pay to your petitioner from the said navy pension fund, the pension allowed her for five years from the said 30th June, 1834, and also the allowance made her from said fund for the arrearages of the half pay of a post captain, from the death of the said Commodore Stephen Decatur, which occurred upon the 22d day of March, 1820, to the said 30th June, 1834, as directed by said resolution.

And your petitioner also respectfully avers and represents to your honors, that in and by said resolution and the act of Congress aforesaid, she became entitled to receive, and the said Honorable James K. Paulding, secretary of the navy, was bound to pay to her the sum of nine thousand six hundred and fifty dollars, being the full amount of your petitioner's pension from the 30th June, 1834, for five years, and your petitioner being entitled to receive the full pay of a post captain as stated in said resolution, which pay was at the time of her husband's death $1200 per year, and eight rations per day, at 25 cents for each ration; and also to have paid to the Secretary of the Treasury, to be vested in trust for her, the further sum of thirteen thousand seven hundred and seventy-two dollars and twenty-five cents, for the arrearages of the half pay of a post captain from the death of her said husband, up to the said 30th June, 1834, both of which said two sums of money, amount to the aggregate sum of twenty-three thousand four hundred and twenty-two dollars and twenty-five cents, which said sum of money or any part or parcel of the same, the said James K. Paulding refuses to pay to your petitioner, or to any person for her, although he has often been requested by your petitioner so to do; but on the contrary, the said James K. Paulding pretends to say that your petitioner is not entitled to the same, or to any part thereof, notwithstanding the several acts and proceedings of Cngress which declare that she shall be paid the same.

Your petitioner further avers and states that she is not only entitled to the said several sums of money, but that the said James K. Paulding ought to be compelled to pay her the interest upon the same from the time the said several sums of money ought to have been paid to her. Wherefore, your petitioner respectfully prays that your honors, the premises considered, will award the United States writ of mandamus to be directed to the said James K. Paulding, Secretary of the Navy of the United States, commanding him, that he shall fully comply with, obey, and execute, the aforesaid resolution of Congress, of the 3d of March, 1837, by paying to your petitioner and to the Secretary of the Treasury, in manner and form as said act or resolution provides, or as your honors shall think proper, the full and entire amount of the aforesaid sum or sums of money, with interest thereon, or such part or portion thereof as your honors may direct; and as in duty bound will ever pray, &c.

WASHINGTON COUNTY, *District of Columbia, to wit:*

Susan Decatur, the aforesaid petitioner, being duly sworn according to

law, deposes and says, that she is the party petitioner in the aforesaid petition named, and that the said petition does faithfully and truly detail the facts therein stated, and that all the matters stated in said petition are true to the best of her knowledge and belief.

Sworn and subscribed this 25th day of November, 1839, before me.
LEWIS CARBERY.

Exhibit A.—*Exhibit A.*

No. 2. Resolution granting a pension to Susan Decatur, widow of the late Stephen Decatur.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Mrs. Susan Decatur, widow of the late Commodore Stephen Decatur, be paid from the navy pension fund a pension for five years, commencing from the thirtieth day of June, eighteen hundred and thirty-four, in conformity with the provisions of the act concerning naval pensions and the navy pension fund, passed thirtieth June, eighteen hundred and thirty-four, and that she be allowed from said fund the arrearages of the half pay of a post captain, from the death of Commodore Decatur to the thirtieth of June, eighteen hundred and thirty-four, together with the pension hereby allowed her, and that the arrearage of said pension be vested in the Secretary of the Treasury, in trust for the use of the said Susan Decatur: provided that the said pension shall cease on the death or marriage of the said Susan Decatur.

Approved, March 3, 1837.

Affidavit of R. S. Coxe.—*Affidavit of R. S. Coxe.*

U. STATES
vs.
JAMES K. PAULDING,
Secretary of the Navy.

On the relation of Susan Decatur, on motion for mandamus.

Richard S. Coxe, of counsel for relator, being duly sworn according to law, deposes and says, that he, on behalf of said Susan Decatur, did some months since make application to said James K. Paulding, secretary of the navy, for the payment of the money averred to be due in her petition filed in this case; that said James did decline and refuse to execute the said resolution of Congress; that this deponent has strong reasons to believe, and does believe, that since the passage of said resolution, viz: on the 3d March, 1837, and since, and up to this date, there have been and are sufficient funds belonging to the navy pension fund to pay the full amount claimed by said relator and petitioner, and that payment has been refused on grounds wholly disconnected with any want of funds.

Sworn in open court, this 25th November, 1839.
Test: W. BRENT, Clerk.

Thereupon the court made the following order in the premises.

CIRCUIT COURT OF THE DISTRICT OF COLUMBIA,
For the County of Washington.

Rule on Hon. J. K. Paulding to show cause why a mandamus should not issue.

UNITED STATES, on the relation of Susan Decatur, *vs.* JAMES K. PAULDING, Secretary of the Navy of the United States.	No. 437. Trial docket.

The petition of the relator verified by her affidavit, and the additional affidavit of Richard S. Coxe having been presented to the court, setting forth in substance, that the Congress of the United States passed a resolution which was approved by the President of the United States on the 3d day of March, 1837, in and by which it was provided "That Mrs. Susan Decatur, (the petitioner) widow of the late Commodore Stephen Decatur, be paid from the navy pension fund a pension for five years, commencing from the thirtieth of June, eighteen hundred and thirty-four, in conformity with the provisions of the act concerning navy pensions and the navy pension fund, passed the thirtieth of June, eighteen hundred and thirty-four; and that she be allowed from said fund the arrearages of the half pay of a post captain from the death of Commodore Decatur to the thirtieth of June, eighteen hundred and thirty-four, together with the pension hereby allowed her, and that the arrearages of said pension be vested in the Secretary of the Treasury, in trust for the use of the said Susan Decatur: Provided, that said pension shall cease on the death or marriage of the said Susan Decatur." That said petitioner is still single and unmarried. That by an act of Congress approved by the President of the United States on the 10th day of July, 1832, the Secretary of the Navy of the United States is constituted the trustee of the naval pension fund, and it is made his duty to grant and pay the pensions according to the terms of the acts of Congress in such cases made and provided. That said petitioner made application to the Honorable James K. Paulding, Secretary of the Navy of the United States, to grant her the said pension allowed her by the resolution of Congress aforesaid, and the arrearages of half pay in manner and form as was granted and directed in and by said resolution; and that he has, and still doth, refuse, omit, and neglect, notwithstanding the positive provisions of the aforesaid resolution of Congress, and the vested right of said petitioner, to pay to her from the said navy pension fund the pension allowed her for five years, from said 30th June, 1834, and also the allowance made her from said fund for the arrearages of half pay of a post captain from the death of the said Commodore Stephen Decatur, which occurred upon the 22d day of March, 1820, to the said 30th June, 1834, as directed by said resolution.

That said petitioner, under and by said resolution, became entitled to have and receive, and the said James K. Paulding, secretary of the navy, was bound to pay to her the sum of nine thousand six hundred and fifty dollars, being the full amount of said petitioner's pension from the 30th June, 1834, for five years; and said petitioner was also entitled to re-

ceive or have paid to the Secretary of the Treasury, to be vested in trust for her, the further sum of thirteen thousand seven hundred and seventy-two dollars and twenty-five cents, for the arrearages of the half pay of a post captain, from the death of her said husband up to the 30th of June, 1834; which said two sums amount to the aggregate sum of twenty-three thousand four hundred and twenty-two dollars and twenty-five cents, which said sum of money, or any part or parcel thereof, the said James K. Paulding refuses to pay to petitioner or any person for her, although often requested by the petitioner so to do; but on the contrary, said James K. Paulding pretends to say, that said petitioner is not entitled to the same or any part thereof, notwithstanding the several acts and proceedings of Congress which declare that she shall be paid the same.

That said petitioner is entitled not only to said several sums of money, but also to interest on the same from the time when said sums respectively became due; and that said James K. Paulding ought to be compelled to pay the same. That there have been, and are funds and money belonging to said naval pension fund and applicable to the payment of said moneys, amply sufficient for the payment and satisfaction thereof, as affiant has reason to believe, and does believe. Wherefore the petitioner prays the court to award the United States' writ of mandamus to be directed to the said James K. Paulding, Secretary of the Navy of the United States, commanding him that he fully comply with, obey and execute the aforesaid resolution of Congress of the 3d of March, 1837, by paying to your petitioner, and to the Secretary of the Treasury in trust for her, in manner and form as said acts and resolution provide, or as the court shall think proper, the full and entire amount of the aforesaid sum or sums of money, with interest thereon, or such portion thereof as your honors may direct.

Whereupon, on motion of Richard S. Coxe, and Brent and Brent, for said relator, and upon reading of said petition and accompanying papers, it is this 25th day of November, 1839, ordered by the said circuit court that the said James K. Paulding, Secretary of the Navy of the United States, shew cause, on Monday, the ninth day of December next, why the said writ of mandamus should not issue as prayed by said petitioner, and that a copy of this order be served on the said James K. Paulding, Secretary of the Navy of the United States as aforesaid.

W. BRENT, Clk.

R. S. Coxe,
W. L. Brent.

Copies of which were placed in the hands of the marshal of this District, to be served on the honorable James K. Paulding, and returnable the 9th day of December. And now, to wit, the 9th day of December, 1839, the marshal, to whom the order aforesaid was delivered, makes the following return:

Served, by leaving a copy of the order with the honorable James K. Paulding, Secretary of the Navy of the United States, on the 27th day of November, 1839.

ALEXANDER HUNTER, Marshal.

And the said James K. Paulding, Secretary of the Navy, appears in court here, by F. S. Key, Esq., and files the following answer, to wit:

Answer by the Hon. J. K. Paulding.

To the honorable the judges of the circuit court of the District of Columbia, for Washington county.

The undersigned, James K. Paulding, Secretary of the Navy of the United States, respectfully states:

That he hath been served with notice of an order or rule from this honorable court, requiring him to show cause why a writ of mandamus should not be issued from the said court, directed to him as Secretary of the Navy of the United States, upon the petition of Mrs. Susan Decatur, commanding him to pay certain sums of money out of the navy pension fund, claimed by said petitioner to be due to her under a certain resolution of Congress referred to in the aforesaid petition.

The undersigned considers it his duty, in the first place, to protest against the jurisdiction of the circuit court invoked on this occasion, for the following reasons:

1st. Because, as Secretary of the Navy of the United States, he is not subject, in the discharge of the duties of his office by the constitution and laws of the United States, to the control, supervision, and direction of the said court.

2d. Because, as such secretary, he is by law constituted the trustee of the navy pension fund, and it is made his duty, as such, "to receive applications for pensions, and to grant the same according to the terms of the acts of Congress in such cases provided." He is also required to cause books to be opened, and regular accounts to be kept, showing the condition of the navy and privateer pension funds, the receipts and expenditures thereof, the names of the pensioners, and the dates and amount of their respective pensions, with a statement of the act or acts of Congress under which the same may be granted; and he shall annually report to Congress an abstract shewing the condition of these funds in all these particulars, and the receipts and expenditures during the year; and there is no law authorizing the circuit court of this district to control and direct him in the discharge of these duties.

3rd. Because such jurisdiction in this court would, if assumed, operate as such an interference with the discharge of the official duties of the undersigned, as to make it impossible for him to perform them as required and intended, and would transfer to the said court the discharge of the said duties, and the whole management and disposition of the said fund, and subject all applicants for pensions to the delay, expense, and embarrassments of legal controversies as to their rights, and to a suspension of the provisions to which they might be entitled under the laws, till these controversies were judicially decided.

4th. Because such a jurisdiction in the circuit court would make the United States sueable in that court, and subject the money of the United States, in the Treasury of the United States, to be taken therefrom by the judgments of said court.

5th. Because if the circuit court assumes the jurisdiction of compelling

the secretary of the navy, or the head of any other department, to revise and reverse the decisions that may have been made by their predecessors in office, these officers will necessarily be taken off from the discharge of their immediate and most urgent public duties, and made to apply their time and attention, and that of the clerks in the departments, in an endless review and reconsideration of antiquated claims and settled questions, to the delay and hinderance of measures of vital importance to the national welfare and safety.

For these and other reasons which he trusts will be obvious, on further consideration, to the court, he respectfully objects to the jurisdiction assumed in this case; and will now proceed, under such protest, to show cause why the mandamus prayed for should not be issued.

The undersigned was somewhat surprised to see it stated in the petition of the relatrix, that "he had been often requested by her to pay the two several sums of money stated in the petition, amounting to the aggregate sum of twenty-three thousand four hundred and twenty-two dollars and twenty-five cents." And that he had refused so to do. And that "he pretended to say that the petitioner was not entitled to the same, or any part thereof." The undersigned has no recollection of ever having refused the payment of any sum, or any sums of money, demanded in behalf of Mrs. Decatur, except so far as this may have been inferred from his declining to reconsider her claim on grounds which he will now proceed to state.

Sometime in September, 1838, the undersigned received a communication from the counsel of Mrs. Decatur, informing him that they had examined the documents connected with her claims, and the opinion of the late attorney general, Mr. Butler, upon the strength of which the claim appeared to have been disallowed by his predecessor, and that they were satisfied that the decision which had been made was not warranted by law.

A reconsideration of the case was then asked of the undersigned, "if he felt himself at liberty to revise the decision of his predecessor." And if this could not be complied with, he was then asked "to give such instructions to the district attorney as will enable him to concur with them in bringing the subjec before a competent tribunal, in order to obtain a judicial decision upon the case." To this application the undersigned replied, "that the claim having been examined and decided by his predecessor, in conformity with the opinion of the late attorney general, he did not feel himself authorised to disturb that decision, as no new facts had been adduced to call for a re-examination." And, further, that he also declined the second proposition of the counsel, "being unwilling to give a precedent, which if once established, will place every executive officer of the Government in the attitude of a defendant in all cases where individuals are dissatisfied with his decisions."

After this reply, no further application was made to the undersigned; but in February last, a memorial was presented to the President of the United States in behalf of the claimant, by her counsel, in which a reconsideration of the case and his interference were requested, and that "if he should be of opinion that the claim was lawful and proper to be allowed, that he would direct the secretary of the navy to exe

cute the resolution in favor of the claimant without further delay." In this memorial the opinion of the late attorney general, and the decision of the late secretary of the navy were stated, and it was added that "the claim had been recently renewed before the present secretary of the navy, and again rejected, not upon a consideration of its merits, but because it had been before acted upon and denied, and no new matter shewn upon the new application."

On this memorial the President decided, that "he did not find in the papers submitted to him sufficient to justify the interference asked for;" and of this the counsel for the claimant was informed.

The undersigned has been thus particular for the purpose of shewing distinctly the nature of the application and its refusal. He desires it should be seen that he placed this refusal solely upon the ground that his predecessor had decided it, after a full consideration, and after calling for the official opinion of the attorney general, and that no new facts were adduced to authorise him to reconsider it; and he desires now that this shall be considered by the court as a distinct ground of objection to the relief now prayed for.

He presumes that even if the court shall decide that it possesses the jurisdiction claimed, it will not consider that it is bound to exercise it in all cases, and under all circumstances; and that after a claim has been heard and rejected by the officer authorised to decide upon it, it still remains in the power of the claimant to call it up and compel a reconsideration of it from every successive officer who may be subsequently appointed in the place of the officer making the decision. It is obvious that if such a course is allowed, there can be no such thing as the final decision of a controverted claim.

The executive officers must always continue to consider it as an open claim, and the funds of the Government as still liable to its demands. Nor is it possible for the affairs of the Government to be properly administered, if the executive officers, instead of devoting themselves to the discharge of the duties brought before them, and which are abundantly sufficient to occupy all their time and attention, are to be called upon to go back to the times of their predecessors, and determine whether they have properly discharged the duties they were required to execute.

These considerations, and an experience of the impossibility of thus conducting the public business committed to them, have long since obliged all the executive departments, under every administration, with the sanction, as the undersigned believes, of several successive attornies general, to adopt the rule that no claim once fully heard and rejected by the competent officer can be considered open to the review and reconsideration of the successor to such officer, unless new matter can be shewn to justify such re-examination.

It is evidently as important to the public interests, if the courts shall be considered as invested with the jurisdiction claimed on this occasion, that they should respect this rule.

The inconveniences resulting from disregarding it by the courts in the exercise of such a jurisdiction, are the same. The same unsettled state of controverted claims, the *the* same uncertainty as to the national funds, kept open to rejected demands, which may interfere with the rights of

other claimants and with the public interests, and the same misemployment of the time and attention of the public officers to cases already decided by their predecessors, must continually occur; for, although the decision is ultimately made by the court, yet the officer to whom the command is to be directed must examine the case and every thing connected with it, so as to present it to the consideration of the court. Indeed, much more of his time and attention may be withdrawn from the immediate duties of his station, by his being called to answer before a judicial tribunal on such occasions, and make that defence against the proceedings which he may feel bound to do, than by a reconsideration of the claim.

Under such circumstances it has been heretofore thought necessary by claimants whose demands have been rejected, and who were dissatisfied with such rejection, to make their application to Congress, and where it has been thought reasonable and just by the legislature that their claims should be allowed, acts have passed for their allowance, or the accounting officers have been authorized to open and reconsider their claims. And it appears to the undersigned that there would be a peculiar propriety in seeking that mode of redress in relation to the present claims, which arises from the circumstance of there being two legislative enactments of the same date, making nearly similar provisions for the claimant, and the question being whether she is entitled to one or both of these provisions. The decision of that question by the late secretary of the navy, and the opinion of the attorney general, upon which it is founded, are herewith presented to the court.

The undersigned observes that a specific sum is stated in the petition as being the amount of the pension claimed. He has already stated that no sum was stated in the application made to him. It appears from the amount stated, that the petitioner claims not only half the pay to which the deceased was entitled, but half the pay and rations, or pay and emoluments.

This will present to the court, in case they should assume the jurisdiction, and decide in favor of the petitioner, a question under the pension laws, as to the construction of the words, half the pay and half the monthly pay, in those acts of Congress. The uniform construction of all these laws, in all the departments of the Government, has invariably been such as to confine the pension to the pay proper—the expression being in all these acts, pay, and not pay and rations, or pay and emoluments. The undersigned is not aware that any claimant of a pension has ever before suggested a different construction.

In conclusion, he admits in relation to the state of the navy pension fund, that there is at present a sufficient amount to pay the claim of the petitioner, if it was now to be paid. What may be its state when the payment may be ordered, if it should be ordered, it will be impossible for him to state, inasmuch as it will depend on the number of applicants whose claims may be made and allowed in the mean time. And he thinks it proper to state that if the payment of the sum stated in the petition shall be commanded by the decision of the court, in consequence of the court's deciding that the pensioners under these acts of Congress are entitled to half pay and rations, or pay and emoluments, of the deceased

officers and seamen, then he apprehends the navy pension fund would be greatly insufficient to pay the present claimant and the other pensioners whose claims have been allowed, but who have only received half the pay proper, exclusive of rations or emoluments. All which he respectfully submits.

J. K. PAULDING.

Opinion of the Attorney General.

ATTORNEY GENERAL'S OFFICE, April 11th, 1839.

SIR: I have had the honor to receive your letter of the 15th ult'o, relative to the case of Mrs. Susan Decatur.

It is assumed in your statement of the case, that Mrs. Decatur would be entitled to the pension granted by the act of the 3d ultimo, for the equitable administration of the navy pension fund, "were it not for the doubt created by the passage, on the same day, of the joint resolution for her special benefit. And on these two laws you enquire whether she is entitled under the resolution, or under the act, or under both."

This case differs from that of Mrs. Perry referred to in the note of Mrs. Decatur, accompanying your letter, inasmuch as the law under which Mrs. Perry ultimately obtained her pension was in existence at the time of his death, at which time she was also entitled (although not then aware of the fact) to its benefits. I held in her case, that the law granting her an annuity, for such it was called, could not deprive her of the pension given by a pre-existing law; and that as Congress were presumed to be acquainted with the laws in force, the legal intendment must be, that the annuity was designed as an additional provision, and, consequently, that she was entitled to both.

After maturely considering the history of the general and special provisions on which the present case depends, I am of opinion that but one pension can be allowed; but if the general provision includes the case of Mrs. Decatur, then I am of opinion she is entitled to take, under that provision, or under the joint resolution at her election.

I am, very respectfully, your ob't serv.

B. F. BUTLER.

The HON. MAHLON DICKERSON,
Secretary of the Navy.

Letter from Secretary of the Navy to Mrs. Decatur.

NAVY DEPARTMENT, 14th April, 1837.

DEAR MADAM: The attorney general has given his opinion, that in your case but one pension can be allowed; he, however, thinks that you have your selection to take under the general law, or under the resolution in your particular case; as soon as your pleasure upon this subject shall be known, the warrant for pension shall be made out.

I am, with great respect and esteem, your ob't h'le s't,

M. DICKERSON.

Mrs. SUSAN DECATUR,
George Town, D. C.

And afterwards, to wit, on the 14th day of December, the said Susan Decatur, by her attornies aforesaid, filed in court here, in the said cause, the following amendment to her said petition, to wit:

Amended petition.

Your petitioner prays leave to amend her petition by stating, that by the individual whom she employed to make the calculations shewing the extent of her claim, a mistake was accidentally made, which, although not noticed in the return of the defendant, the petitioner is desirous of rectifying, at this stage, in the progress of the case. The mistake consists in this, that the calculation embraces five years' full pay instead of five years' half pay, as by reference to the acts of Congress will appear; this will reduce the amount claimed as follows:

Amount actually calculated in original petition - -	$9,650
Deduct one-half - - - - - -	4,825
	$4,825
Which deducted from the gross sum claimed in original petition - - - - - - - -	23,422
	$18,597

Which said sum of eighteen thousand five hundred and ninety-seven dollars is the amount of the principal sum actually due to, and claimed by, your petitioner.

RICHD. S. COXE,
BRENT & BRENT,
For petitioner.

Dec'r 14th, 1839.

Judgment of the Court.

Whereupon all and singular the premises having been seen, heard, and fully understood by the court, and after hearing counsel, and mature deliberation being thereupon had, it appears to the court here that the said rule or order be overruled, and that said application of the said Susan Decatur for a mandamus be refused, and that she be in mercy, &c.

Test: W. BRENT, Clk.

Return to Writ of Error.

And whereas, afterwards, to wit: on the 16th day of January, in the year of our Lord one thousand eight hundred and forty, the said Susan Decatur, by her attorney aforesaid, produced and filed in court here the United States writ for the correcting of errors of and upon the judgment, directed to the judges of the circuit court of the District of Columbia, in the county of Washington; and in pursuance thereof, and according to the form and effect of the law in such case made and provided, a

transcript of the record of proceedings of the judgment aforesaid, and all things thereunto relating, with the writ of error aforesaid, and a copy of the appeal bond hereunto annexed, is hereby transmitted to the said Supreme Court accordingly.

In testimony whereof I have hereunto subscribed my name, [SEAL.] and affixed the seal of the said circuit court for the county aforesaid, this 27th January, 1840.

W. BRENT, Clk.

743.

SUPREME COURT OF THE UNITED STATES.

No. 76.

THE UNITED STATES, PLAINTIFF,

vs.

JOHN P. B. GRATIOT, ROBERT BURTON, CHARLES F. HEMPSTEAD, & DICKINSON B. MOOREHOUSE.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. FOR ILLINOIS.

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Langtree & O'Sullivan, Print.—1840.

THE UNITED STATES OF AMERICA
vs.
JOHN P. B. GRATIOT,
ROBERT BURTON, CHARLES S. HEMPSTEAD,
and DICKINSON B. MOOREHOUSE.

Pleas in the Circuit Court of the United States of America for the District of Illinois, held at Vandalia, in and for the District aforesaid, before the Hon. John McClean, one of the Justices of the Supreme Court of the United States, presiding, and the Hon. Nathaniel Pope, Judge of the District Court of the United States for the District of Illinois, Associate Judges of said *of said* Circuit Court, on Friday, the seventh day of June, of the term of June, A. D. eighteen hundred and thirty-nine, and of our Independence the 63d year.

DISTRICT OF ILLINOIS, *ss.*

The United States of America put in their place their district attorney, against John P. B. Gratiot, Robert Burton, Charles S. Hempstead and Dickinson B. Moorehouse, in a plea of debt.

DISTRICT OF ILLINOIS, *ss.*

John P. B. Gratiot, Robert Burton, Charles S. Hempstead and Dickinson B. Moorehouse put in their place Sidney Breese, the irattorney, at the suit of the United States in the plea aforesaid.

DISTRICT OF ILLINOIS, *ss.*

Be it remembered, that on the seventh day of May, eighteen hundred and thirty-nine, the United States of America, by Ferris Forman, their attorney, came into the clerk's office of the circuit court of the United States for the district of Illinois, and with leave of the court before that time had and obtained, filed their certain amended declaration in this case, in the words and figures following, to wit:

In the circuit court of the United States for the district of Illinois, of the December term of said court, in the year of our Lord one thousand eight hundred and thirty-six:

STATE AND DISTRICT OF ILLINOIS, *ss.*

The United States of America, plaintiffs in this suit, by F. Forman, their attorney, complain of John P. B. Gratiot, Robert Burton, Charles S. Hempstead and Dickinson B. Moorehouse, defendants in

this suit, who were summoned, &c., of a plea that they render unto the said plaintiffs the sum of ten thousand dollars, which to them they owe and unjustly detain from them. For that whereas the said defendants, by the names, abbreviations, contractions and descriptions of J. P. B. Gratiot, Robert Burton, Chas. S. Hempstead, J. B. Moorehouse, on the first day of September, in the year of our Lord one thousand eight hundred and thirty-four, at the town of Vandalia, in the State and district of Illinois, and within the jurisdiction of this court, by their certain writing obligatory, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and to stand firmly bound unto the said plaintiffs, or their certain attorney, in the penal sum of ten thousand dollars, current money of the said United States, to be paid unto their treasury; which payment was well and truly to be made, when they, the said defendants, should be thereunto requested.

And the said plaintiffs, according to the form of the statute in such case made and provided, say that the said writing obligatory was and is subject to a certain condition thereunder written; whereby, after reciting to the effect following, that is to say, that whereas the said John P. B. Gratiot and Robert Burton had obtained from the agent of the said United States a license bearing date the first day of September, 1834, containing stipulations, therein more particularly described, to smelt lead ore, it is provided that the said John P. B. Gratiot and Robert Burton should faithfully and fully execute and comply with the terms and conditions set forth in said license; then the said obligation was to be void and of no effect—otherwise, to remain in full force and virtue.

And the said plaintiffs further say, that the said license in the condition of the said writing obligatory mentioned was made and entered into on the first day of September, 1834, by and between Thomas C. Legate, superintendent of the United States lead mines, of the first part, and the said John P. B. Gratiot and Robert Burton, of the second part; one part of which license, called an indenture, sealed with the seals of the said John P. B. Gratiot and Robert Burton, the said plaintiffs bring here into court, the date whereof is the day and year aforesaid; in which license, called an indenture, among other things, it is recited that the said John P. B. Gratiot and Robert Burton are permitted, by and with the approbation of the President of the United States, to purchase and smelt lead ore at the United States lead mines on the Upper Mississippi, (which lead mines, referred to in said license, called an indenture, the said plaintiffs aver are situated on the east side of the Mississippi river, in that district of country formerly known as the Indiana Territory,) for and during the term of one year from the date of said license, subject, however, to be revoked upon the said plaintiffs giving three months notice of such intended revocation: and among other covenants, conditions and agreements contained in said license, called an indenture, as by said recited license (relation being thereunto had)

does more fully appear, the said John P. B. Gratiot and Robert Burton agreed to pay to Thomas C. Legate, superintendent of the United States lead mines, for the use of the United States, six pounds of every hundred pounds of lead ore smelted by them under said license, called an indenture, to be paid monthly, in clear, pure lead, at the warehouse on Fever river, or at such other place, near the mines, as the said superintendent should direct, and free of expense to the said plaintiffs. Nevertheless, the said plaintiffs in fact say, that after the making the said writing obligatory, to wit, on the first day of June, one thousand eight hundred and thirty-five, at the place aforesaid, the said John P. B. Gratiot and Robert Burton did not faithfully and fully execute and comply with the terms and conditions set forth in said license, in this, to wit, that under said license, a large quantity of lead, to wit, twenty-four hundred thousand pounds of lead, was and has been smelted by said John P. B. Gratiot and Robert Burton under said license; six pounds of every hundred pounds of lead so by them smelted, in pure, clear lead, amounting to one hundred and forty-four thousand pounds, ought and should have been paid to said Thomas C. Legate, superintendent as aforesaid, for the use of the said plaintiffs: yet the said John P. B. Gratiot and Robert Burton have wholly neglected and refused to pay the same, according to the tenor and condition of the said license, and have hitherto wholly refused to pay the same to the said superintendent, or to the said plaintiffs. By means of which said premises, the said plaintiffs have sustained damage to a large amount, to wit, to the amount of ten thousand dollars: whereby an action has accrued to the said plaintiffs, to demand and have of and from the said defendants the sum of ten thousand dollars first above demanded. Yet the said defendants, although often requested so to do, have not as yet paid the said sum of ten thousand dollars above demanded, or any part thereof, to the said plaintiffs, but to pay the same, or any part thereof, to the said plaintiffs, they, the said defendants, have hitherto wholly refused, and still do refuse, to the damage of the said plaintiffs of ten thousand dollars. And therefore they sue, &c.

And now at this day, to wit, the third day of June, of the term of June, one thousand eight hundred and thirty-nine, come the said defendants, by Breese, their attorney, and defend the wrong and injury when, &c., and crave oyer of the said writing obligatory and the license therein referred to, and the condition of the said writing obligatory; and they are read to them in these words:

License Bond.

Know all men by these presents, that we, J. P. B. Gratiot, Robert Burton, D. B. Moorehouse, and Charles S. Hempstead, are holden, and stand firmly bound unto the United States of America, or their certain attorney, in the penal sum of ten thousand dollars, current money of the said United States, well and truly to be paid unto

their treasury; for which payment, well and truly to be made, we, the said J. P. B. Gratiot, Robert Burton, D. B. Moorehouse, and Charles S. Hempstead, do hereby, jointly and severally, bind ourselves, our heirs, executors, and administrators, and each and every of them, jointly, severally, and firmly, by these presents. Signed with our hands, and sealed with our seals, this first day of September, in the year of our Lord one thousand eight hundred and thirty-four.

The condition of the above obligation is such, that whereas the said J. P. B. Gratiot and Robert Burton has obtained from the agent of the United States a license, bearing date the first day of September, 1834, containing stipulations therein more particularly described, to smelt lead ore: Now, if the said J. P. B. Gratiot and Robert Burton shall faithfully and fully execute and comply with the terms and conditions set forth in said license, then, and, in that case, this obligation to be void and of no effect, otherwise to remain in full force and virtue.

J. P. B. GRATIOT, (SEAL.)
ROBERT BURTON, (SEAL.)
CHS. S. HEMPSTEAD, (SEAL.)
J. B. MOOREHOUSE, (SEAL.)

Witnesses present: GEO. GOLDTHORP,
PETER AYDELOTT,
ABRAHAM BLAYLEN.

License for Smelting.

This indenture made and entered into this first day of Sept'r, 1834, between Major T. C. Legate, superintending the United States lead mines, acting under the direction of the Secretary of War, of the first part, and J. P. B. Gratiot and Robert Burton, of the second part, witnesseth:

That the said party of the second part is hereby permitted, by and with the approbation of the President of the United States, to purchase and smelt lead ore at the United States lead mines, on the Upper Mississippi, for the period of one year, from and after the date hereof, upon the following condition, viz:

First. All purchases or other acquisitions of ore, ashes, zinc, or lead, to be from persons authorized to work the mines, either as lessees, smelters, or diggers, and from no others; and no ore to be purchased from the leased premises of any person without his permission.

Second. To commence smelting as soon as one hundred thousand pounds of ore are obtained, and to continue it so long as any is on hand; to weigh a charge of ore for the log-furnace and the lead produced from it, when required to do it by the said first party, or his assistant.

Third. To keep a book containing an accurate account of all ore, ashes, or zinc, purchased or otherwise acquired, and of all lead

manufactured: which book shall, at all times, be open to inspection of the said first party, or his assistant; and to furnish a transcript or return at the end of every month (agreeably to a form furnished by the said first party): which book and returns to be verified on oath if required.

Fourth. The said second party hereby agrees to pay the first party, for the use of the United States, six pounds of every hundred pounds of all the lead smelted by him, under this indenture, to be paid monthly in clear, pure lead, at the ware-room on Fever river, or at such other place near the mines as the said first party shall direct, and free of expense to the United States. And the said second party is not to sell, or remove from the places of smelting, in any manner whatever, any lead, until the rent be paid as aforesaid. This condition is subject to the revocation of the Government upon giving three months' previous notice; at which time, it will be optional with the licentiate to accept or refuse the new terms. Upon his refusal to accept, then this license shall cease and determine.

Fifth. The second party is allowed to have as much fuel as will suffice, without waste, for the purpose of this indenture, and to cultivate as much land as will suffice to furnish his teams, &c. with provender.

Sixth. It is understood and agreed, between the aforesaid parties, that the said second party shall not employ, in any manner, any smelter, lessee, or miner, who has forfeited his license, lease, or permit to mine, nor any other person who is at the mines without the authority of the said first party; and the said second party agrees not to employ or harbor the laborers of workmen of another smelter. Sixty days are allowed, after the expiration of this license, to close all business under it; but it is understood that no purchase, or hauling of ore, is to take place after the license is expired. The bond given for the faithful performance of the contract is to be in full force and virtue until a written settlement is made.

It is distinctly understood by the said parties, that, upon proof being afforded to the first party that either of the foregoing stipulations have been violated or not complied with, he may declare this indenture null and void, and re-enter and take possession of all the premises as if no such agreement existed.

THO. C. LEGATE, (SEAL.)
Major U. S. Army, Sup. L. Mines.
J. P. B. GRATIOT, (SEAL.)
ROBERT BURTON. (SEAL.)

Witnesses present: GEO. GOLDTHORP,
PETER AYDELOTT,
ABRAHAM BLAYLEN.

Which being read and heard, the said defendants, for plea, say, (plaintiffs aforesaid, actio non) because they say that the said plaintiffs' amended declaration, and the matters and things therein contained, are not sufficient, in law, to enable the said plaintiff to have

and maintain their action *aforesaid* against them, and that they are not bound, by the laws of the land, to answer the same, which they are ready to verify; wherefore, for the want of a sufficient declaration in this behalf, the said defendants pray judgment, &c.

And the said United States of America, by their attorney, say, that the declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient, in the law, for them to have and maintain their aforesaid action thereof against the said defendants, and the said plaintiffs are ready to verify and prove the same, as the court here direct and award; wherefore, inasmuch as the said defendants have not answered the said declaration, nor in any manner denied the same, the said plaintiffs pray judgment, and their debt and damages, in the said declaration mentioned, to be adjudged to them, &c.

And now at this day, to wit, the seventh day of June, of the term of June aforesaid, come the said plaintiffs, by their attorney aforesaid, as well as the said defendants, by their said attorney; and, on argument of the demurrer, the opinions of the judges were opposed in the following points:

1st. Whether the President had power, under the act of the 3d March, 1807, to make the contract set forth in the declaration.

And on the motion of the counsel for the United States, this cause is certified to the Supreme Court in pursuance to the act of Congress.

A true and correct transcript of the declaration, demurrer with contents and joinder, and the action of said circuit court thereupon, as appears of record, and on file in my office.

In testimony whereof, I, James F. Owings, clerk of said circuit court, have hereunto affixed the seal of said court, and subscribed my name, this first day of August, A. D. eighteen hundred and thirty-nine, and of our Independence the 64th year.

(SEAL.)

JAMES F. OWINGS, *Clk.*

Opinion of Judge McLean.

Congress have power to authorize the President to lease lead mines. These mines being designated in the law of 1807, as being within the Indiana territory, may still be leased under the law, though the territory has been divided and afterwards organized into two States.

The term territory, in this respect, is used as descriptive of the locality of the mines, and not to limit the exercise of the power to any subdivisions of it.

The lease being for smelting ore is within the law. It is unnecessary for the lease to require the lessee to perform all the operations of mining.

Such a power exercised by the Federal Government, does in no respect interfere with State sovereignty.

It was a prudential and proper regulation to limit, in the lease, the price of lead.

Mr. Norman, the district attorney, appeared for the plaintiffs, and Mr. Breese for the defendant.

Opinion of the Court.

This action is brought on a lease of a lead mine, and by the pleadings and in the argument, the question is raised as to the power of Congress to authorize the leasing of lead mines or any part of the public lands.

It is insisted that this is a government of limited powers, and that unless specially given, no power can be exercised by it.

No one can dispute the position, that the powers of the Federal Government are limited, and that it can exercise none, as principal powers, which are not delegated to it. But it is impossible in a constitution to specify in detail, every power, which of necessity, must be exercised in the government.

Congress has power by the Constitution to establish post offices and post roads, and under this delegation of power, the post office department, in its numberless details, is regulated; and severe punishments inflicted for a depredation upon the mail or a wilful obstruction of its conveyance.

There is no express power authorizing Congress to regulate the duties of postmasters, or the duties of the postmaster general, or to punish for stealing a letter from the mail; and yet no one has ever doubted the powers of the Federal Government to act on these subjects. It necessarily results from the exercise of the main power, to establish post offices and post roads. It would be in vain to establish, unless there be power to protect and restrain that which is established. Hence there are powers of a secondary or dependant character, which

result from a principal power that may be exercised though not specifically given in the Constitution.

The Constitution was adopted by practical men, and it was designed for practical purposes, and that refinement of construction, which refuses to the Federal government, powers essential to its existence, must be discarded. Power is not to be repudiated, because the Constitution does not, in terms, give it. But, on the other hand, powers are not to be exercised by implication, which are not dependant on, and do not result from, a principal power clearly given; there is danger from either extreme.

In the third section of the sixth article of the Constitution it is declared, "that Congress shall have power to dispose of and make all needful rules and regulations, respecting the territory, or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

And in the fifth section of the act, third March, 1807, it is provided "that the several lead mines in the Indiana territory, together with as many sections contiguous to each, as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine, which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null. And the President of the United States shall be, and is hereby authorised to lease any lead mine which has been, or may hereafter be, discovered in the Indiana territory, for a term not exceeding five years."

In other acts of Congress, before and subsequent to this one, reservations are made of lands containing salt springs, live oak, &c., and salt springs have been leased under a similar authority to that which is given to lease lead mines.

If, under the Constitution, Congress have power to make all needful rules and regulations respecting the territory of the United States, there would seem to be no ground to doubt, that Congress may sell the public lands, or lease them, as may be deemed needful; or they may make donations of the same for objects of national interest.

This, it is admitted, may all be done so long as the land remains within a territory of the United States; but it is contended that it is incompatible with State sovereignty, to exercise the power within a State.

Since the passage of the above act, the States of Indiana and Illinois have been formed within the limits of the Indiana territory, as they were established in 1807, and the lead mine in question is within the State of Illinois.

A doctrine somewhat similar to this was at one time advanced, with some prospect of embodying in its favor, a strong public feeling. It was, indeed, not only asserted, that the laws of the United States, which regulated the sale of the public lands within a State, were

void; but that the lands rightfully belonged to the State. This doctrine was well calculated to enlist in its behalf local feelings and interests; but the sober sense of public sentiment, gave little encouragement to so novel and dangerous an error.

The constitutional provision in regard to the power of Congress over the public lands, applies without reference to the local political jurisdiction, within which they are situated. This position will not be controverted, by any one, successfully, who admits the Constitution of the United States to be the ~~permanent law~~ paramount law.

This power over the public lands does not extend to the exercise of a political jurisdiction. It is a special and limited jurisdiction that applies, exclusively, to regulations respecting the lands. And this jurisdiction is as clearly given, in the Constitution, as any one of the enumerated powers delegated to the Federal Government.

Where a political jurisdiction is desired, as within the District of Columbia, and sites for forts and arsenals, the Constitution has made provision for a cession of such jurisdiction. And the power over the public lands is specifically given, by a cession or delegation from the States to the Federal authority.

How the exercise of this power is incompatible with State sovereignty, I cannot perceive. When we speak of State sovereignty, we do not speak of a sovereignty without limitation. A State cannot declare war, impair the obligations of a contract, coin money, emit bills of credit, or do many other things which belong to sovereignty. State sovereignty is absolute and unconditional, where no limitations are imposed. But the power of a State over the public lands is necessarily inhibited by the delegation of the power to the Federal Government. The States having given up the power, cannot exercise it.

Over an organized territory of the United States, Congress have the exclusive power of legislation. The above constitutional provision in regard to the public lands, was not necessary, to give Congress the power to adopt all needful regulations respecting them within a territory of the United States. The provision was intended to secure the exercise of the power over the property of the Union within the States. Unless this was the intention, it must have been adopted without any sensible or necessary object.

The act authorizing the President to lease lead mines refers to them as situated in the territory of Indiana, but this is merely descriptive of the locality of the mines; and does not limit the exercise of the power to the boundaries of Indiana as they might afterwards be changed. The lead mines within the original limits of the territory were the mines which the law authorized the President to lease, and no subdivision of the territory or change from a territorial to State governments, can affect the exercise of the power.

Congress in the exercise of their discretion have determined that to lease lands which contain lead mines, is a needful regulation; and I should like to know where the power exists to declare that this is not a needful regulation. There is nothing in the compacts of

cession of these lands which forbid it; and it does not, in any respect, infringe upon the rights of the State.

But it is said that this is a lease, for smelting lead ore, in which the price is regulated, and not for working the mine. This objection to the lease cannot be sustained. Digging the ore and smelting it may be included in the same lease, or these operations may be the subject of distinct leases. In either case, the lease is within the law, as it is literally a lease of a lead mine; not indeed requiring the lessee to carry on all the operations of mining, but one of its important branches or all of them, as shall be deemed best under all the circumstances of the case.

The limitation imposed on the price of the manufactured article, is a very proper regulation in the lease, as it prevents monopolies, and other consequences injurious to the public, by a combination of the lessees.

The argument is not sustainable, that if the United States may do this, they may engage in any other traffic, within a State, and regulate prices at pleasure. This consequence does by no means follow.

The government has a right to prevent trespassers upon the public lands, and to admit settlers on such terms as it shall think proper. It has a right to lease lead mines, and to include such parts of the adjacent land as are necessary to the working of the mines. And it has the right to stipulate with the lessee, as one of the conditions of his lease, that he shall sell the ore he digs, or the lead he manufactures, at a fixed price. I can see no possible objection to such a regulation. It is one that any individual on leasing a farm may make. He may stipulate with the lessee that he shall sell his grain at a fixed price, and that the lessee shall have the option of buying it. Such a contract, being voluntary, is binding; and so is the contract in question.

For many years the government rented salt springs in Illinois, Ohio, and perhaps in other States; and it is believed to have been the practice to fix in these leases the price at which the salt should be sold.

Such a provision, instead of aiming to monopolize, is calculated to guard against a monoply; the effects, instead of being injurious, must be beneficial to the community.

But, however this may be, it is clear to my mind, that such a regulation in no respect interferes with the sovereignty of the State, or any local law which the State has power to pass.

I am, therefore, of the opinion that the lease is within the law, and is binding on the lessees, and that the demurrer must be overruled.

The district judge being of a different opinion from the one here expressed, the points were certified to the Supreme Court for a decision, under the act of Congress.

749.

SUPREME COURT OF THE UNITED STATES.

No. 82.

THE UNITED STATES, PLAINTIFF,

vs.

SAMUEL B. STONE.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR NEW YORK.

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Langtree & O'Sullivan, Print.—1840.

At a stated term of the Circuit Court of the United States of America for the southern district of New York, in the second circuit held at the city Hall, in the city of New York, on Saturday the fourth day of January, in the year of our Lord one thousand eight hundred and forty.

Present: The Honorable SMITH THOMPSON, and SAMUEL R. BETTS.

The UNITED STATES OF AMERICA
vs.
SAMUEL BARTLETT STONE.

This is an action of debt, originally brought in the district court for the southern district of New York, against the defendant, as master of the steamboat New York, to recover the penalty of three hundred dollars, given by the ninth section of the act of the seventh of July, eighteen hundred and thirty-eight, entitled "An act to provide for the better security of the lives of passengers on board vessels propelled in whole, or in part by steam."

The pleadings in this cause were as follows:

SOUTHERN DISTRICT OF NEW YORK, *ss.*

The United States of America, plaintiffs in this suit, by Benjamin F. Butler, the attorney of the said United States, complains of S. Bartlett Stone, defendant in this suit, being in custody, &c., of a plea, that he render to the said plaintiffs twelve hundred dollars, lawful money of the said United States, which he, the said defendant, owes to the said plaintiffs and from them unjustly detains. For that, whereas, the said defendant, heretofore, to wit: on the twelfth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, on the sea and within the jurisdiction of this court, was the master of a certain steamboat, called the New York, which said steamboat was then and there navigating the said sea: yet the said defendant being, then and there, the master of said steamboat as aforesaid, and not regarding the statute in such case made and provided, nor fearing the penalties therein contained, did suffer and allow the said steamboat to be navigated by wheel and tiller ropes contrary to the form of the said statute, and did wholly neglect to employ and use iron rods or chains in the navigation of the said steamboat, as required by the said statute; whereby and by force of the said statute, an action hath accrued to the said plaintiffs to demand and have of and from the said defendant the sum of three hundred dollars, parcel of the said sum above demanded.

And the said plaintiffs further say, that the said defendant, again disregarding the statute in such case made and provided, and not fearing the penalties therein contained, did afterwards, to wit: on the twelfth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, on the sea, and within the jurisdiction of this court, to wit: at the city of New York, in the county of New York, and in the southern district of New York, command a certain steamboat called the New York, as the master thereof; which said steamboat was then and there employed on the said sea, at the place aforesaid, and that iron chains or rods were not then and there employed and used in the navigation of the said steamboat, instead of wheel or tiller ropes as required by the said statute, but that wheel and tiller ropes were then and there employed and used in the navigation of the said steamboat, contrary to the form of the said statute; whereby and by force of the said statute an action hath accrued to the said plaintiffs, to demand and have of and from the said defendant the further sum of three hundred dollars, other parcel of the said sum above demanded.

And the said plaintiffs further say that the said defendant, again disregarding the statute in such case made and provided, and not fearing the penalties therein contained, afterwards, to wit: on the twelfth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, at the city of New York, in the county of New York, and in the southern district of New York, was the master of a certain steamboat called the New York, which said steamboat usually plied between the said city of New York, and the city of New Haven, in the State of Connecticut, and that in the navigation of the said steamboat, when so plying between the said city of New York and the said city of New Haven, and while the said defendant was the master thereof, to wit: on the day and year last aforesaid, at the place last aforesaid, iron rods or chains were not then and there employed and used in the navigation of the said steamboat, instead of wheel or tiller ropes, as required by the said statute; but, that wheel and tiller ropes were then and there employed and used in the navigation thereof, contrary to the form of the said statute; whereby and by force of the said statute, an action hath accrued to the said plaintiffs, to demand, and have of, and from the said defendant the further sum of three hundred dollars, other parcel of the said sum above demanded.

And the said plaintiffs further say, that the said defendant, again disregarding the statute in such case made and provided, and not fearing the penalties therein contained, afterwards, to wit, on the twelfth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, in the city of New York, in the southern district of New York, was the master of a certain steamboat, usually plied between the said city of New York and the city of New Haven, in the State of Connecticut, and that in the navigation of the said steamboat when so plying between the said city of New York and the the said city of New Haven, and whilst the said defendant was the master thereof, to wit, on the day and year, and at the place last aforesaid, iron rods or chains were not then and there employed and used in the navigation of the said steamboat, instead

of wheel ropes as required by the said statute, but that wheel ropes were then and there employed and used in the navigation thereof, contrary to the form of the said statute; whereby, and by force of the said statute, an action hath accrued to the said plaintiffs, to demand and have of and from the said defendant the further sum of three hundred dollars, other parcel of the said sum above demanded.

Yet the said defendant, although often requested, to wit, on the day and year last aforesaid, and at the place aforesaid, hath not rendered the said sum of twelve hundred dollars above demanded, or any part thereof, to the said plaintiffs, but the said defendant hath hitherto wholly refused, and still doth refuse, to render the same, or any part thereof, to the said plaintiffs, to the damage of the said plaintiffs of five hundred dollars; and, therefore, the attorney of the said plaintiffs, on behalf of the said plaintiffs, brings suit, &c. And the said defendant, by George R. J. Boudoin, his attorney, also comes and defends the wrong and injury, when, &c.; and says, that he does not owe the said sums of money above demanded, or any or either of them, or any part thereof, in manner and form as the said plaintiffs have above, thereof, complained against him; and of this the said defendant puts himself upon the country, and the said plaintiffs do the like, &c.

To which said plea, the said defendant subjoined the following notice:

Sir: Please to take notice that the said defendant, on the trial of the above cause, will insist upon and give in evidence under the general issue above pleaded, that the said steamboat New York, in the said plaintiffs' declaration mentioned, was not at the time therein mentioned employed upon the sea or navigating the same; and, also, that iron rods, as required by the said statute, were used and employed in the navigation of the said steamboat; and, further, that the said steamboat was, at the time aforesaid, provided with a rudder and tiller constructed after the manner of those usually employed in vessels that are steered by a tiller, which was at all times ready for use, and could be used to steer the said steamboat upon any emergency requiring it. And, further, the said defendant will give in evidence, that it is impossible for iron rods to pass around the axle or drum of the wheel, by which the said steamboat was steered, or through the tiller blocks of the said steamboat, in such a way as to allow the rudder of said boat to traverse, so that the said boat can be steered by said wheel. And, also, that it would be impossible, while steering said boat with said wheel, to steer the said boat with safety, if chains or iron rods were used around the axle or drum of the said wheel, or through the said tiller blocks; and if iron rods or chains were attempted to be made use of around said drum or through said tiller blocks, the certain loss or injury of said steamboat would ensue, by her striking on some or one of the rocks, or running ashore in some or one of the difficult passes on the route upon which said boat was employed, that is to say, between the points of departure of said boat from the city of New York and the city of New Haven; or the said loss or injury would ensue by bringing

the said boat alongside of her usual landing places; and, further, the said defendant will give in evidence, as aforesaid, that a compass is frequently, necessarily, used and employed in the navigation of the said steamboat, on her said route between New York and New Haven, and is necessarily kept in or near the pilot's house, or house which contains the wheel used in steering the said boat; and that the employment or use of iron rods or chains around the drum of said wheel would affect the said compass in such a way as to render it no certain evidence of the course or direction of said steamboat.

Yours, &c.,

G. R. J. BOUDOIN,
Atty. for Defendants.

New York, April 27, 1839.

To B. F. BUTLER, Esq., U. S. Dist. Atty.

The cause was tried in the district court before his honor Judge Betts, in June, eighteen hundred and thirty-nine, and a verdict taken for the plaintiffs, by consent, subject to the opinion of the court, on a case agreed on, which case was also, by consent, removed into this court, and is as follows:

Michael Sandford, called on the part of the United States, testified, that the defendant was master of the steamboat New York, of which witness was pilot, a steamboat which plied during the last autumn and winter between New Haven, in the State of Connecticut, and the city of New York, and which was employed during that time, under the defendant's command, in the transportation of passengers and freight. That during the voyage between the said ports, she was steered with wheel ropes and rudder ropes connected with iron rods. The iron rods were used for about one hundred and forty feet, midships of the vessel: they extended sixty feet forward and aft of the boilers: they were connected with the wheel ropes and rudder ropes which were spliced into the eye of the rod. About sixty-five feet of ropes were used in connection at the wheel and about ninety at the rudder. No tiller ropes were used. The wheel-house was about sixty-five feet from the bow of the boat, which was about two hundred and twenty feet in length. About eight feet of the rope at the wheel was inside of the wheel-house, around the drum of the wheel. In steering, the rod would sometimes be brought quite up to the block near the wheel, or to the block near the rudder. From those points the ropes were used instead of the rods, because the latter could not be worked around the block and wheel. The rods were cut of such length, that when the rudder was carried hard on one side, the rods on that side came close up to the forward block on that side, and the rod on the other side was carried close up to the after block on the other side, and vice versa; the rods were as long as they could be and yet allow the rudder to be worked, the forward blocks being fixed forward as far as the wheel and the after blocks, within a few feet of the stern.

Prior to the passing of the act of eighteen hundred and thirty-eight, ropes had been used for the whole extent, and the rods were substituted, so far as used, in compliance with the law, at a great expense and for the

express purpose of fitting the boat according to the requirements of the law in question. The vessel had a tiller. The rudder post comes up above the deck, and there is a tiller to steer with, but no ropes, chains or rods connected with it. When used, which is always done when coming through Hurl-Gate, it is done by a man standing at the tiller. No iron chains have been used in steering the vessel, at any time either before or since the act of eighteen hundred and thirty-eight.

The compass by which the boat is steered is placed within two feet and a half of the steering wheel, and must be so placed, to enable the pilot to see it. Being asked by the defendant's counsel what effect would be produced upon the compass by using chains, where the ropes were used which connected the rods with the wheel, the plaintiff's counsel objected to the question as irrelevant to the issue, which was disallowed, and thereupon the defendant's counsel excepted.

The defendant called Elihu S. Bunker, of the city of New York, who testified that he had for more than twenty years commanded and navigated steamboats, from the city of New York to Providence, and other places, and was perfectly acquainted with the subject of navigating and steering steamboats in Long Island Sound, and that he was also one of the inspectors, appointed by the district judge of the southern district of New York, for the inspection of steamboats, pursuant to the third section of the aforesaid act of eighteen hundred and thirty-eight. Witness has built five steamboats for navigating Long Island Sound; fitted them all with rods and ropes as the New York is fitted: this done several years ago. Upon being asked by defendant's counsel in what way he would fit up a boat, under the law of eighteen hundred and thirty-eight, the plaintiffs' counsel objected to the question, which was disallowed, and thereupon the defendant excepted.

The defendant's counsel offered to prove by practical men what was the practical meaning of the law; and that in their opinion, the law had been substantially complied with in this case; the plaintiffs' counsel objected; the court sustained the objection, and the defendant's counsel excepted.

The defendant's counsel then offered to prove that steamboats could not be navigated by the use of rods alone; the plaintiffs' counsel objected to the testimony as irrelevant, and the objection was sustained by the court, and the defendant excepted.

The defendant's counsel then offered to prove, that by the use of iron chains round the wheel the compass placed as above stated would be affected so as seriously to endanger the lives of the passengers and crew, by preventing the compass from traversing: the plaintiffs' counsel objected, and the court disallowed the testimony, and the defendant's counsel excepted.

The defendant's counsel offered to prove that it was impracticable, with a due regard to the safety of the passengers, at the ordinary speed of steamboats, to comply with the provision of this section of the law; the plaintiffs' counsel objected, the court sustained the objection, and the defendant's counsel excepted.

The defendant's counsel offered to prove that in the opinion of persons

practically acquainted with the subject, that the boat in question had been fitted conformably with the exigencies of the law of eighteen hundred and thirty-eight, upon which the action is founded: but the evidence being objected to, was rejected by the court and the defendant excepted.

A map of Long Island Sound was also produced, and it is understood that any maps and charts of the sound and of the East river, and any geographical descriptions thereof, to which either party may think proper to refer, are to be considered as part of the case.

The defendant's counsel contended, that the act of Congress upon which this suit was founded was repugnant to the Constitution of the United States, and therefore void; that the law did not apply to vessels navigating between the city of New York and New Haven; that the law on its true construction did not require that a steamboat should be steered with iron chains, or with iron chains or rods, if by its being so steered the vessel could not be safely navigated. And that the defendant, upon this construction of the law, had proved a sufficient compliance therewith.

His honor, the judge, charged the jury, that for the purpose of this suit he should rule that the law in question was constitutional, and that *that* the words "*all steamboats*" in the ninth section, applies only to vessels required to be licensed; that all steamboats navigating the East river with wheel or tiller ropes, and not with iron chains or rods, are liable to the penalty: that the court having rejected the testimony offered by the defendant, there was no question of fact left for the jury to pass upon; that the whole question was one of construction; that Congress had assumed the regulation of steamboats and imposed upon them certain restrictions, and it was to be determined whether Congress had the power to do this. Congress has interdicted the use of wheel or tiller ropes, and required that of iron rods or chains to steer with; and this applies to all steamboats, not only those on the high seas, but to those on rivers and lakes, every where within the United States. The law is universal in its terms. The only question of fact to be enquired about is, whether iron rods or chains were employed in the navigating of the boat in question, instead of wheel or tiller ropes? that it was proved that tiller ropes were not used. But that if it was proved to the satisfaction of the jury, that wheel ropes were used in steering the New York, then the fourth count in the declaration covers the case. No doubt Captain Stone complied with the law as he understood it, and as far as he thought it practicable; but that is not sufficient—the defendant cannot say it is difficult or unsafe to use iron rods and chains. Congress had directed that ropes are not to be used, and it is no answer to say that steamboats cannot be navigated with rods and chains. But for the more full consideration of these questions, his honor recommended, with the consent of the counsel on both sides, that the jury should find a verdict for the plaintiffs, subject to the opinion of the court, upon a case to be made, with leave to either party to turn the same into a bill of exceptions or special verdict. Upon which the jury found such verdict accordingly. Upon the argument of the above case in this court the judges were divided in opinion upon the following questions:—

1st. Whether that clause of the ninth section of the act of Congress referred to, which provides "that iron rods or chains shall be employed and used in the navigation of all steamboats, instead of wheel or tiller ropes," applies to all steamboats which are required by the former sections of the said act to be licensed as therein provided?

2nd. Whether said clause applies only to steamboats employed on the lakes, mentioned in the eighth section, and on the sea, and whether "sea" in the ninth section is to be taken in its admiralty sense or in its geographical sense?

3rd. Whether the clause above quoted applied to the steamboat commanded by the defendant upon that part of the voyage described in the case which was within the southern district of New York? And when upon that part of said voyage which was not within the southern district of New York? If it did in either or both, whether the said defendant is liable for that reason to the penalty given by the ninth section?

4th. Whether the use of the wheel ropes described in the above case was, under the circumstances proved in said case, a violation of the requirements of the said clause, and rendered the defendant liable for that reason to the penalty given by the ninth section?

5th. Whether, if this case be considered within the penalty of the ninth section, that section, so far as it relates to the employment and use of rods and chains under the penalty as therein expressed, is a constitutional and valid law?

Which said points, upon which the judges were so divided in opinion, were then and there, at the request of the counsel for the parties, stated under the direction of the judges, and ordered by the court to be certified under the seal of this court to the Supreme Court of the United States at their next session, for their decision.

FRED. J. BETTS, Clerk.

754.

SUPREME COURT OF THE UNITED STATES.

No. 83.

THE UNITED STATES, PLAINTIFF,

vs.

CHARLES A. WOOLSEY.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT UNITED STATES FOR NEW YORK.

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Langtree & O'Sullivan, Print.—1840.

At a stated term of the Circuit Court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Saturday the fourth day of January, in the year of our Lord one thousand eight hundred and forty.

Present, the Honorable Smith Thompson and Samuel R. Betts.

THE UNITED STATES OF AMERICA
vs.
CHARLES A. WOOLSEY.

This is an action of debt, originally brought in the district court of the southern district of New York, against the defendant, as master of the steamboat Providence, to recover the penalty of three hundred dollars, given by the ninth section of the act of the seventh of July, eighteen hundred and thirty-eight, "to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam." The pleadings of this cause were as follows:

SOUTHERN DISTRICT OF NEW YORK, ss.

The United States of America, plaintiffs in this suit, by Benjamin F. Butler, the attorney of the said United States, complains of Charles A. Woolsey, defendant in this suit, being in custody, &c. of a plea that he render to the said plaintiffs twelve hundred dollars, lawful money of the said United States, which he, the said defendant, owes to the said plaintiffs, and from them unjustly detains. For that, whereas, the said defendant, heretofore, to wit, on the twelfth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, on the sea, and within the jurisdiction of this court, was the master of a certain steamboat, called the Providence, which, said steamboat, was then and there navigating the said sea, yet, the said defendant being then and there the master of said steamboat, as aforesaid, and not regarding the statute in such case made and provided, nor fearing the penalties therein contained, did suffer and allow the said steamboat to be navigated by wheel and tiller-ropes, contrary to the form of the said statute, and did wholly neglect to employ, and use iron rods or chains in the navigation of the said steamboat, as required by the said statute. Whereby, and by force of the said statute, an action hath accrued to the said plaintiffs to demand and have of and from the said defendant the sum of three hundred dollars, parcel of the said sum above demanded.

And the said plaintiffs further say, that the said defendant again disregarding the statute in such case made and provided, and not fearing the penalties therein contained, did afterwards, to wit, on the twelfth day of February, in the year of our Lord one thousand eight hundred and thir-

ty-nine, on the sea, and within the jurisdiction of this court, to wit, at the city of New York, and in the county of New York, and in the southern district of New York, command a certain steamboat, called the Providence, as the master thereof, which said steamboat was then and there employed on the said sea, at the place aforesaid, and that iron rods or chains were not then and there employed and used in the navigation of the said steamboat instead of wheel or tiller ropes, as required by the said statute, but that wheel and tiller ropes were then and there employed and used in the navigation of said steamboat, contrary to the form of the said statute, whereby and by force of the said statute, an action hath accrued to the said plaintiffs, to demand and have of and from the said defendant the further sum of three hundred dollars, other parcel of the said sum above demanded.

And the said plaintiffs further say, that the said defendant, again disregarding the statute in such case made and provided, and not fearing the penalties therein contained, afterwards, to wit, on the twelfth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, at the city of New York, in the county of New York, in the southern district of New York, was the master of a certain steamboat called the Providence, which said steamboat usually plied between the said city of New York and the city of Providence, in the State of Rhode Island, and that on the navigation of the said steamboat when so plying between the said city of New York and the said city of Providence, and while the said defendant was the master thereof, to wit, on the day and year, and at the place last aforesaid, iron rods or chains were not then and there employed and used in the navigation of the said steamboat, instead of wheel or tiller ropes, as required by the said statute, but that wheel and tiller ropes were then and there employed and used in the navigation thereof, contrary to the form of the said statute. Whereby, and by force of the said statute, an action hath accrued to the said plaintiffs to demand and have of and from the said defendant the further sum of three hundred dollars, other parcel of the said sum above demanded.

And the said plaintiffs further say, that the said defendant, again disregarding the statute in such case made and provided, and not fearing the penalties therein contained, afterwards, to wit, on the twelfth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, at the city of New York, in the southern district of New York, was the master of a certain steamboat called the Providence, which said steamboat usually plied between the said city of New York and the city of Providence, in the State of Rhode Island, and that in the navigation of the said steamboat when so plying between the said city of New York and the said city of Providence, and whilst the said defendant was the master thereof, to wit, on the day and year, and at the place last aforesaid, iron rods or chains were not then and there employed and used in the navigation of the said steamboat, instead of wheel ropes as required by the said statute, but that wheel ropes were then and there employed and used in the navigation thereof, contrary to the form of the said statute. Whereby and by force of the said statute, an action hath accrued to the said plaintiffs to demand and have of and from the said defendant

the further sum of three hundred dollars, other parcel of the said sum above demanded.

Yet the said defendant, although often requested, to wit, on the day and year last aforesaid, and at the place aforesaid, hath not rendered the said sum of twelve hundred dollars, above demanded, or any part thereof, to the said plaintiffs, but the said defendant hath hitherto wholly refused and still doth refuse to render the same, or any part thereof, to the said plaintiffs, to the damage of the said plaintiffs of five hundred dollars, and therefore the attorney of the said plaintiffs, on behalf of the said plaintiffs, brings suit, &c.

SOUTHERN DISTRICT OF NEW YORK, ss.

Charles A. Woolsey, defendant in this suit, puts in his place Charles E. Butler, his attorney, at the suit of the United States of America. And the said Charles A. Woolsey, defendant in this suit, by Charles E. Butler, his attorney, comes and defends the wrong and injury, when, &c., and says that he does not owe the said sums of money above demanded, nor any part thereof, in manner and form as the said plaintiffs have above thereof complained against him; and of this the said defendant puts himself upon the country, and the said plaintiffs do the like, &c.

CHARLES E. BUTLER,
Attorney for Defendant.

To which said plea, the said defendant subjoined the following notice:

SIR: Please to take notice that the said defendant, on the trial above cause, will insist upon, and give in evidence under the general issue above pleaded, that the said steamboat Providence, in the said plaintiffs' declaration mentioned, was not, at the time therein mentioned, employed upon the sea or navigating the same.

And also, that iron rods, as required by the said statute, were used and employed in the navigation of said steamboat. And further, that the said steamboat was, at the time aforesaid, provided with a rudder and tiller constructed after the manner of those usually employed in vessels that are steered by a tiller, which was at all times ready for use, and could be used to steer the said steamboat upon any emergency requiring it. And further, the said defendant will give in evidence that it is impossible for iron rods to pass around the axle or drum of the wheel by which said steamboat was steered, or through the tiller blocks of said steamboat, in such a way as to allow the said boat to be steered by said wheel. And also, that it would be impossible, while steering said boat with said wheel, to steer the said steamboat with safety, if chains or iron rods were used around the axle or drum of the said wheel or through the said tiller blocks, and if iron rods or chains were attempted to be made use of around said drum, or through said tiller blocks, the certain loss or injury of said steamboat would ensue by her striking on some or one of the rocks, or running ashore in some or one of the different places on the route upon

which said boat was employed; that is to say, between the points of departure of said boat from the city of New York and town of Stonington. And further, the said defendant will give in evidence, as aforesaid, that a compass is frequently necessarily used and employed in the navigation of the said steamboat on her said route between New York and Stonington, and is necessarily kept in the pilot's house, or house which contains the wheel used in steering said boat, and that the employment or use of iron rods or chains around the drum of said wheel would affect the said compass in such away as to render it no certain evidence of the course or direction of the said steamboat.

Yours, &c.

CHARLES E. BUTLER,
Attorney for Defendant.

To B. F. Butler, Esq.,
U. S. Dist. Att'y.

The cause was tried in the district court before his honor Judge Betts, in June, eighteen hundred and thirty-nine, and a verdict taken for the plaintiffs, by consent, subject to the opinion of the court, in a case agreed on; which case was also, by consent, moved into this court, and is as follows:

It was proved on the part of the plaintiffs that the defendant was master of the steamboat Providence, a boat which plied during the autumn of 1838 and the winter of 1839, between Providence, in the State of Rhode Island, and the city of New York, and which was employed, during that time under the defendant's command, in the transportation of passengers and freight; that during her voyages between the said ports, she was steered with wheel ropes and tiller ropes, connected with iron rods. The iron rods were used for about one hundred feet midships of the vessel; they were connected with the wheel ropes and tiller ropes, which were spliced into the eye of the rod. About sixty-five feet of ropes were used in connection at the wheel, and about ninety at the rudder. The wheel house was about sixty feet from the bow of the boat, which was about two hundred and thirty feet in length. About eight feet of the rope at the wheel was inside the wheel house, around the drum of the wheel. In steering, the rod would sometimes be brought quite up to the block at the wheel, or to the block at the rudder. From those points the ropes were used instead of the rods, because the latter could not be worked around the block and wheel. Prior to the passing of the act of eighteen hundred and thirty-eight, ropes had been used the whole extent, and the rods were substituted, as far as used, in compliance with the law. The vessel had a tiller. The rudder part comes up above the deck, and there is a tiller to steer with; but no ropes, chains, or rods, connected with it when used; (which is always done when coming through Hurl Gate) it is done by a man at the tiller. No iron chains have been used in steering the vessel at any time either before or after the act of eighteen hundred and thirty-eight.

It was proved on the part of the defendant, that it was not practicable,

consistently with a due regard to the safety and comfort of the passengers, to steer a steamboat with iron chains through Long Island Sound, and especially through Hurl Gate, at the present usual rate of speed, which is from twelve to fourteen or fifteen miles an hour. That in clear weather, a steamboat steered with iron chains, or iron chains and rods, may be propelled through the sound at the present usual rates of speed; but in dark nights, or during a fog, this could not be done consistently with the safety of the passengers and crew. That the difficulty with chains and rods, or chains alone, is, that to steer a vessel running at the rate of thirteen or fourteen miles an hour, in this way more help is required, and the vessel going at this rapid rate cannot be managed with sufficient quickness by iron chains, or iron chains and rods. That when a steamboat is passing at this rate, through the difficult passage of Hurl Gate, very quick and short movements are required. And the like movements are required when meeting vessels in the sound, during a dark night, or in a fog. That it would, therefore, be unsafe to allow a steamboat, so steered, to be propelled in the places mentioned, at the present usual rapid rates. But that there is no difficulty in steering a steamboat through Hurl Gate, nor in navigating the sound, at any time, with iron chains, or iron chains and rods, provided the speed be fixed at six or seven miles an hour. That, at this latter rate, a steamboat so steered may safely be navigated through Hurl Gate, though at particular times of the tide she might be obliged to lie by for three or four hours until a change of tide, in order to get through with safety. Other witnesses, acquainted with the navigation of the sound, by steamboats, testified in substance in the same manner as above.

A map of Long Island Sound was also produced, and it is to be understood, that any maps and charts of the sound, and of the East river, and any geograpical descriptions thereof, to which either party may think proper to refer, are to be considered as part of the case.

The defendant's counsel offered to prove, that in the opinion of persons practically acquainted with the subject, the proprietors of the boat in question had sufficiently complied with the exigencies of the law of eighteen hundred and thirty-eight, upon which the action is founded; but the evidence being objected to, was rejected by the court, and the defendant excepted.

The defendant's counsel contended that the act of Congress upon which this suit was founded was repugnant to the Constitution of the United States, and therefore void; that the law did not apply to vessels navigating between the city of New York and Providence; that the law, on its true construction, did not require that a steamboat should be steered with iron chains, or with iron chains and rods, if by its being so steered the vessel could not be safely propelled at the ordinary speed of steamboats in use, at the time of the enactment of the law. And that the defendant, upon this construction of the law, had proved a sufficient compliance therewith.

His honor, the judge, intimated an opinion adverse to the defendant, on these several points of law, but recommended it to the jury to find a verdict for the plaintiffs, subject to the opinion of the court upon a case to

be made, with leave to either party to turn the same into a bill of exceptions or special verdict.

Upon which, the jury found such verdict accordingly.

Upon the argument of the above case in this court, the judges in this court were divided in opinion upon the following questions:

1st. Whether that clause of the ninth section of the act of Congress referred to, which provided "that iron rods or chains shall be employed and used in the navigation of all steamboats, instead of wheel or tiller ropes," applies to all steamboats which are required by the former sections of the said act to be licensed as therein provided?

2d. Whether said clause applies only to steamboats employed on the lakes mentioned in the eighth section, and on the sea, and whether "sea" in the ninth section is to be taken in its admiralty sense, or in its geographical sense?

3d. Whether the clause above quoted applied to the steamboat commanded by the defendant, upon that part of the voyage described in the case, which was within the southern district of New York? And when upon that part of said voyage which was not within said district? And if it did in either or both, whether the defendant is liable for that reason to the penalty given by the ninth section?

4th. Whether the use of the wheel ropes described in the above case was, under the circumstances proved in the said case, a violation of the requirements of the said clause, and rendered the defendant liable for that reason to the penalty given by the ninth section?

5th. Whether, if this cause be considered within the penalty of the ninth section, that section so far as it relates to the employment and use of rods and chains, under penalty as therein expressed, is a constitutional and valid law?

Which said points, upon which the judges were so divided in opinion, were then and there, at the request of the counsel for the parties, stated under the direction of the judges, and ordered by the court to be certified, under the seal of the court, to the Supreme Court of the United States at their next session, for their decision.

FRED. J. BETTS, Clerk.

758.

SUPREME COURT OF THE UNITED STATES.

No. 86.

THE UNITED STATES, PLAINTIFF,

vs.

CHARLES JENKINS, ET AL.

ON A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

At a stated term of the Circuit Court of the United States for the Southern District of New York, in the second circuit, held [L. S.] at the City Hall in the city of New York, on Saturday, the fourth day of January, in the year of our Lord one thousand eight hundred and forty.

Present—The Honorable Smith Thompson and Samuel R. Betts.

THE UNITED STATES OF AMERICA,
vs.
CHARLES JENKINS, GEORGE LANGDON, JOHN ALLEN, SIDNEY M. JENNINGS, ALEXANDER CHAPIN, JOHN STONE, AND WILLIAM CLARK.

The defendants were seamen, and part of the crew of the American ship Georgia, and were indicted in this court for an endeavor to make a revolt on the high seas on board of said ship.

The indictment contained several counts, describing the several offences mentioned in the second section of the act of Congress, approved on the third day of March, one thousand eight hundred and thirty-five, and entitled "An act in amendment of the acts for the punishment of offences against the United States."

Upon which indictment aforesaid the defendants were arraigned in open court, and severally pleaded (at such arraignment in person, and by Mr. A. Nash.) The defendants having severally pleaded not guilty, the cause was tried on the third day of August, one thousand eight hundred and thirty-nine, when, by consent of parties, a special verdict was found, stating the following facts:

That the ship Georgia, named in the indictment, is a whale ship, and belongs to the port of New London, in the State of Connecti-

cut, where her owners reside; that the defendants were all seamen and mariners, and belonged to the ship as a part of her crew; that the vessel sailed from New London on the twenty-seventh day of October, one thousand eight hundred and thirty-eight, to go on a whaling voyage to south Georgia and elsewhere in the south Atlantic seas; and that whilst on her said voyage in the said seas, the defendants committed the offence charged in the indictment.

That the vessel had not been enrolled and licensed under the act of Congress, approved on the eighteenth day of February, one thousand seven hundred and ninety-three, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," or any other act of Congress to carry on the whale fishery, but had been registered under the act of Congress, approved on the thirty-first day of December, one thousand seven hundred and ninety-two, entitled "An act concerning the registering and recording of ships and vessels," and had proceeded on her voyage and made the same, and returned to her original port without any such license, and that the registry of the vessel was kept on board during her voyage, and on her arrival at New London was deposited with the collector at that port.

Upon the argument of the foregoing special verdict, the judges of this court were divided in opinion upon the following questions of law:

1st. Whether the ship Georgia was to be regarded, whilst engaged under the circumstances above mentioned in the whaling voyage aforesaid, as a vessel of the United States, for all the purposes of revenue and other laws of the United States?

2d. Whether, if not so to be regarded in all respects, she was yet to be considered as an American vessel, within the meaning of the act of one thousand eight hundred and thirty-five, under which the defendants were indicted?

Which said points upon which the said judges were so divided in opinion, were then and there, at the request of the counsel of the parties, stated under the direction of the judges, and ordered by the court to be certified under the seal of the court to the Supreme Court of the United States, at their next session, for their decision thereon.

FRED. J. BETTS, *Clerk.*

739.

SUPREME COURT OF THE UNITED STATES.

No. 89.

JAMES ATKINS, APPELLANT,

vs.

N. & J. DICK, & CO.

ON APPEAL FROM THE CIRCUIT COURT U. S. FOR THE SOUTH'N DIST. OF MISSISSIPPI.

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Langtree & O'Sullivan, Print.—1840.

JAMES ATKINS
vs.
N. & J. DICK, & Co.

Pleas before the honorable Samuel J. Gholson, district judge of the United States, on the equity side of said court. At a circuit court of the United States, held at the town of Jackson, in and for the ninth circuit and southern district of Mississippi, at the November term, in the year of our Lord one thousand eight hundred and thirty-nine:

Be it remembered, that heretofore, to wit, on the fifth day of August, in the year one thousand eight hundred and thirty-nine, came James Atkins, by Cocke, Davis and Goodwin, his counsel, and filed in the clerk's office of the court aforesaid his bill of complaint against N. & J. Dick, & Co., which bill is in the words and figures following, to wit:

To the honorable Samuel J. Gholson, judge of the district court of the United States for the southern district of Mississippi:

Humbly complaining, your orator, James Atkins, a citizen of the county of Monroe, in said State, showeth unto your honor, that Nathaniel Dick, James Dick, Harry R. W. Hill, and William J. McLean, partners in trade, trading under the name and firm of N. & J. Dick, & Co., whom your orator believes are citizens of the city of New Orleans and State of Louisiana, lately instituted an action of assumpsit against your orator in the circuit court of the United States for the district of Mississippi, on the law side of said court, as owners and endorsers of a certain bill of exchange drawn by Messrs. Cain & Lusk, for about the sum of twenty-four hundred and five $\frac{1}{100}$ dollars, which said suit was brought by said plaintiffs in said court, against your orator as endorser of said bill of exchange, and which said bill your orator believes is now on file in said court in said cause, and which, or a copy thereof, your orator prays he may be at liberty to file as Exhibit A, and that the same may be made and taken as a part of this, your orator's bill of complaint.

Your orator states to your honor that he was accommodation endorser to said bill of exchange for the said Cain & Lusk, and was no otherwise interested on account thereof.

Your orator states to your honor, that one Parham N. Booker also became endorser to said bill of exchange. Your orator further showeth unto your honor, that the said N. & J. Dick, & Co. in said action recovered judgment against him in said court on the 28th day of May, A. D. 1838, for the sum of thirty-two hundred and twenty-five dollars and thirty-eight cents damages, with interest at the rate of

eight per cent. per annum, from said date until paid, and about the sum of one hundred and twenty-one dollars and sixty-seven cents, costs of suit. That the said plaintiffs caused execution to issue from said court on said judgment against your orator; that the same was placed into the hands of the marshal of the northern district of the State of Mississippi, for collection, who levied the same on several negro slaves as the property of your orator, also on several mules: your orator was compelled to give bond for the forthcoming of said property, at the time and place mentioned for the sale of the same, and gave for the forthcoming and delivery of said property, Jester Cocke, Alfred Mullins, and Stephen Cocke, as his securities. Your orator states that he failed to deliver the said property at the time and place mentioned in the condition of said bond; that the said marshal returned the said execution to said court, and that the said bond was forfeited, whereby the said bond had the force and effect of a judgment according to the statute in such case made and provided, as well against the said securities as against your orator.

Your orator states to your honor that since the giving of the said forthcoming bond as aforesaid, that he has ascertained and doth verily believe that the said N. & J. Dick, & Co. had been paid the money mentioned in the said bill of exchange before the institution of the said suit against your orator, but that he had no knowledge of the same at the time of the giving and forfeiture of the said forthcoming bond. He states that he is advised and verily believes that the said bill of exchange was paid to the said N. & J. Dick, & Co., by the said Parham N. Booker, before said action was brought against your orator; that the same was paid because of effects placed into the hands of the said Parham N. Booker, by the said Lusk, one of the drawers of said bill of exchange.

Your orator states that he is advised and believes that he would have had a good and meritorious defence against the said Booker on account of said effects received by him from the said Lusk, with which to pay said bill of exchange, in case the said Booker had have sued in his own name on the said bill of exchange; and your orator charges that the names of the said N. & J. Dick, & Co. have been used with the intent to defeat your orator of his said defence, in case your orator became advised that said effects had been placed into the hands of the said Booker by said Lusk, with which to pay off and satisfy the said bill of exchange.

Your orator charges that, in the proceedings aforesaid, he has been most palpably defrauded, and that in order to consummate said fraud, the said N. and J. Dick & Co. have caused execution to issue on the judgment created by the said forfeited forthcoming bond against your orator and his securities, and have had the same endorsed, no security of any kind to be taken. Which said execution is now in the hands of the marshal of the northern district aforesaid, who will proceed to make the said moneys from off of the property of your orator and his securities, unless prevented by the timely interposition of your honorable court of equity.

But now so it is, may it please your honor, the said N. and J. Dick & Co. combining and confederating together, and with divers other persons at present unknown to your orator, but whose names, when discovered, your orator prays he may be at liberty to insert herein, with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, are absolutely seeking to make said moneys from off of your orator and his said securities.

All which actings and doings are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

In tender consideration whereof, and for as much as your orator can only have adequate relief in the premises in a court of equity, where matters of this and the like nature are properly cognizable and relievable against: To the end, therefore, that the said N. & J. Dick & Co., and their confederates, when discovered, may upon their several and respective corporal oaths, full, true, direct, and perfect answers make to all and singular the matters and things in the said bill of complaint contained, and that as fully and particularly as if the same were here repeated, and they, and every of them, distinctly interrogated thereto; may it please your honor to grant unto your orator the most gracious writ of subpœna issuing out of the chancery side of your honorable court, directed to the said N. & J. Dick & Co., commanding them at a certain day, and under a certain penalty therein to be limited, personally to be and appear before the honorable the district court of the United States for the southern district of Mississippi, and then and there to answer all and singular the matters and things set forth in your orator's said bill of complaint. In like manner, may it please your honor to grant unto your orator a writ of injunction, directed to the said N. and J. Dick & Co., restraining them, and their agents, and attorneys, also the marshal of the northern district of Mississippi aforesaid, under a penalty therein to be inserted, from all other and further proceedings on said judgment and execution.

May it please your honor to make said injunction perpetual; and that your honor will grant unto your orator such other and further relief as the nature of his case may require, and as to justice shall appertain; and, as in duty bound, your orator will ever pray.

DAVIS, COCKE & GOODWIN,
Solicitors for Complainant.

Exhibit A.

NATHANIEL DICK, JAMES DICK, HENRY R. W. HILL, AND WILLIAM J. MCLEAN, Partners, Trading under the firm and style of N. & J. Dick & Co.,
vs.
JAMES ATKINS.

In the Circuit Court U. S. for the District of Mississippi; judgment, May term, 1838, for $3,225 38.

(Copy of the bill of exchange sued on.)

HAZLEGREEN, ALA., JUNE 20, 1834.

Exchange for $2,405 01.

Eleven months after date of this our first of exchange, (second of same tenor and date unpaid,) pay to the order of James Atkins, two thousand four hundred and five $\frac{01}{100}$ dollars, value received, and charge the same to the account of

CAIN & LUSK.

To Messrs. MARTIN, PLEASANTS & Co.,
New Orleans.

Endorsed. "Pay Parham N. Booker, or order.
"JAMES ATKINS.
"Pay N. & J. Dick & Co., or order.
"PARHAM N. BOOKER."

Protested for non-acceptance.

JULIUS MOSSEY, *Not Pub.*

New Orleans, 17th April, 1835.

THE STATE OF MISSISSIPPI, *Monroe County, ss:*

Personally appeared the above named James Atkins, before me, Samuel J. Gholson, judge of the district court of the United States for the southern district of Mississippi, and made oath, that the matters and things set forth in the foregoing bill of complaint, as stated of his own knowledge, are true, and those stated as of the information of others, he believes to be true.

JAMES ATKINS.

Sworn to, and subscribed before me, this 12th day of July, 1839.
S. J. GHOLSON.

To the Clerk of the District Court of the United States for the Southern District of Mississippi:

Let writs of subpœna and injunction issue, as prayed for in the foregoing bill of complaint, on the complainant's entering into bond with Jester Cocke, Alfred Mullins, Stephen Cocke, and William Hill, his securities, in a penalty equal to double the amount of the recovery at law, and conditioned according to law.

S. J. GHOLSON,
Judge U. S. D. C. for So. District of Mississippi.

30th July, 1839.

I do hereby release all errors that may have intervened in the record and proceedings had in the circuit court of the United States for the district of Mississippi, in the case of N. and J. Dick & Co. against James Atkins, and the forthcoming bond given in said case.

Given under my hand and seal this 30th day of July, 1839.

JAMES ATKINS. [SEAL.]

And on the said fifth day of August, in the year 1839, a subpœna in chancery was issued from the clerk's office of the said court, pursuant to the order of the judge, upon said bill endorsed; which is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *So. District of Mississippi, ss:*

The President of the United States to James Dick, H. R. W. Hill, and William J. McLean, (surviving partners of the late firm of N. and J. Dick & Co.,) greeting:

For certain causes offered before us in our circuit court for the southern district of Mississippi, sitting in chancery, we command you, that laying all other matters and things aside, and notwithstanding any excuse, you personally appear at our circuit court in and for the said district, sitting in chancery, to be held at the town of Jackson on the first Monday of November next, to answer to a bill of complaint exhibited against you by James Atkins, complainant, in our said court, and further to do and receive what our said court shall consider in this behalf. Hereof fail not, as you will answer the contrary at your peril.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at Jackson, the first Monday in May, A. D. one thousand eight hundred and thirty-nine, and in the 63d year of the Independence of the United States.

[L. S.]

Issued the fifth day of August, 1839.

WM. BURNS, *Clerk.*

To the MARSHAL *of the So. District of Mississippi.*

Marshal's return. The defendants are not inhabitants of my district. Executed on C. R. Cliffton, one of their attorneys at law, September 6th, 1839.

W. M. GWIN, *Marshal,*
Per B. R. COWHERD, *Dep.*

Copy of Demurrer.

The defendants, by their solicitors, come and say, that by reason of any matter or thing alleged in the complainant's bill of complaint, these defendants are not bound to make any answer whatsoever thereto, other than to demur thereto and to the relief therein sought; and they accordingly demur to the said bill and the relief therein prayed; and, among other grounds of their demurrer, they set down here the following:

1st. It is alleged in said bill, as a substantive and the only ground for injunction of the statutory judgment therein named, that one Parham N. Booker is the actual, though not the nominal plaintiff in said

judgment; that as endorser of the bill of exchange, (the basis of the judgment,) next after the complainant as the first endorser, having paid the amount of the bill to the holders, received certain effects of one of the drawers, whose amount ought to be credited to complainant; and yet the said Booker is not impleaded as a defendant.

2d. Nor is the amount, or value, or nature of the effects, so charged to have been paid to the second endorser, specified in said bill; nor what part or portion was discharged, or whether any of such effects proved productive

3d. The said bill contains no matter or grounds whereon this honorable court can grant the relief prayed therein.

A. HUTCHINSON,
Solicitor for the Defendants.

Joinder in demurrer, in short, by consent.

DAVIS, COCKE, & GOODWIN,
Solicitors for Comp.

And afterwards, to wit, at the said November term of the court aforesaid, to wit, on the twenty-ninth day of November, in the year one thousand eight hundred and thirty-nine, this cause was submitted on a motion to dissolve the injunction; whereupon, after arguments heard, it was ordered, adjudged, and decreed that the demurrer to the bill be sustained, and that the complainant have leave to amend his bill. It was further ordered, adjudged, and decreed, that the injunction in this case be dissolved, and the complainant in said bill decline making any amendment to his bill, and sets the cause down for further hearing upon the bill and demurrer; and, after argument heard, it appearing to the satisfaction of the court that Parham N. Booker was materially interested in the issue of said cause, and that the said Booker had not been made a party to the same, it was, therefore, ordered, adjudged, and decreed, that the said bill be dismissed for want of proper parties to the same, &c.

From which decree the complainants, by their counsel, pray an appeal to the Supreme Court of the United States; which is granted, on said complainants entering into bond with Matthew Holliday, John Hill, Jester Cocke, Alfred Mullins, Stephen Cocke, and William Hill, his securities, conditioned according to law, within thirty days from the adjournment of court.

Copy Appeal Bond.

UNITED STATES OF AMERICA,
Southern District of Mississippi, sct:

Know all men by these presents, that we, James Atkins, Jester Cocke, Alfred Mullins, Stephen Cocke, William Hill, John Hill, and Matthew Holliday are held and firmly bound unto James Dick, Nathaniel Dick, Harry R. W. Hill, and William J. McLean, partners in

trade, trading under the firm and style of N. & J. Dick & Co., in the penal sum of seven thousand dollars, lawful money of the United States, which payment well and truly to be made and done, we bind ourselves and each of us, our, and each of our heirs, executors, and administrators. Sealed with our seals, and dated this 29th day of November, 1839.

The condition of the above obligation is such, That, whereas, at a term of the circuit court of the United States for the southern district of Mississippi, commenced and held at the city of Jackson on the first Monday of November, A. D. 1839, it was ordered, adjudged, and decreed by the said court, that the demurrer of the respondents to the bill of complaint of the said James Atkins against the said N. & J. Dick & Co. be sustained; that the injunction thereon be dissolved and the said bill be dismissed; from which said judgment, order, and decree the said James Atkins hath prayed for and obtained an appeal, in the nature of a writ of error, to the next term of the Supreme Court of the United States, to be holden at the city of Washington.

Now, if the said James Atkins shall prosecute his said appeal with effect, and shall well and truly pay, satisfy, and perform the judgment which the said Supreme Court shall render or pass in the premises, and also damages, interests, and costs, then the above obligation to be void, otherwise to be and remain in full force and virtue.

JAMES ATKINS,	[SEAL.]
STEPHEN COCKE,	[SEAL.]
JESTER COCKE,	[SEAL.]
ALFRED MULLINS,	[SEAL.]
WM. HILL,	[SEAL.]
JOHN HILL,	[SEAL.]
MATTHEW HOLLIDAY.	[SEAL.]

UNITED STATES OF AMERICA,
Southern District of Mississippi, sct:
Circuit Court of the United States.

I, William Burns, clerk of the said circuit court, do hereby certify that the foregoing eight pages contain a full, true, and complete transcript of the record and proceedings in a certain suit in chancery, lately decided in our said court between the parties therein named, as fully and completely as the same now remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this twenty-third day of December, A. D. 1839. [SEAL.]

WM. BURNS, *Clerk.*